כי רצו מאי הוי ניהדרו בהו – What of it, that they wanted; they can withdraw from this agreement.

Overview

The גמרא asks specifically[1] on the מ"ד מחיצה פלוגתא, why can we force them to divide and build a wall, based merely on their agreement to divide. What can stop either of the partners to rescind his previous commitment to divide? It is known that for any commitment to be binding there needs to be a [2]קנין; an act that effectively binds the parties legally to whatever they are committing themselves to do. There is no mention of a קנין in our משנה. Our תוספות will discuss why is this question limited to the מ"ד פלוגתא, and not on the מ"ד גודא as well.

תוספות anticipates the following question:

למאן דאמר מחיצה גודא לא פריך – The גמרא **does not ask** this question (כי רצו' וכו') **on the one who interprets מחיצה to mean a wall.** Why does the גמרא ask the question "כי רצו' וכו' only on the מ"ד that מחיצה means a division and not on the מ"ד who maintains that מחיצה is גודא. Seemingly the same question applies to the מ"ד that מחיצה גודא. They agreed to build a wall; however what stops either of them from reneging on this agreement. There is no mention of a קנין. Why are they obligated to build a wall just because they merely agreed to build it?

תוספות responds that מחיצה גודא is different from מחיצה פלוגתא:

דאיכא למימר דקנו – for we can say that the משנה is discussing a case where the partners **made a קנין,** a binding commitment to build the wall. תוספות will now explain what is the proper type of commitment necessary to make this a valid קנין.

ושעבדו נכסיהן לבנין הכותל – and they pledged their assets to the building of the wall. The קנין was not merely that they are going to build a wall, but rather each partner made a קנין that he is committing and obligating his assets for the purpose of building this wall. The קנין creates a lien on his assets. This is a tangible קנין.

תוספות explains that the same type of קנין cannot apply to the מ"ד פלוגתא:

אלא למאן דאמר פלגותא – however according to the מ"ד that they are merely agreeing **to divide** the חצר –

לא מהני קנין – a קנין for obligating oneself to divide a חצר **is not a valid** קנין

דקנין דברים בעלמא הוא – for it is merely a קנין on **words.** They agree to divide and make a קנין to obligate them to their agreement. However the קנין is not transferring

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[1] תוספות is referencing the גמרא after the parenthesis, where the גמרא states אי בשאין בה דין חלוקה וכו'. See (however) הגהות הב"ח (ד).

[2] The general term קנין usually refers to קנין חליפין (see רש"י here קנין (ד"ה), where the granting party accepts a cloth (or something similar) [from the receiving party (or the witnesses)] and 'in return' commits himself to whatever he is granting.

anything tangible to anyone. There are no assets that are being transferred. There is no lien being placed on any assets. They will both own the same percentage of the property after they divided, as they owned before they divided. A קנין is effective for assets and liens; it is not effective on personal promises, where no transfer of assets is taking place[3].

דלא מסיק אדעתיה שקנו ברוחות – for the גמרא did not originally **entertain the thought that they made a קנין concerning the location.** That type of a קנין is not a קנין דברים. Originally the entire property was owned jointly by both partners. They agreed to partition it (let us assume) in a north-south division. Each partner is transferring to the other all of his rights to the other half of the property which he is presently relinquishing. This is a קנין on something tangible; notably his rights in the other half of the property. However the מקשן did not think that the משנה is discussing this type of a קנין[4].

Summary

According to the מ"ד גודא, there was never a question that they could renege on their commitment, for it is assumed that they made a קנין and pledged their assets for the wall. However, according to the מ"ד פלוגתא making a קנין for division is invalid since it is merely a קנין דברים. The מקשן did not entertain the possibility that they made a קנין ברוחות.

Thinking it over

What would be the דין if the partners said while making the קנין that they are committing themselves to build a wall; is that considered קנין דברים or not?[5]

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[3] When the גמרא asked כי רצו וכו', the גמרא knew that they made a קנין (otherwise, ask the question on מ"ד מחיצה גודא as well); however the גמרא maintained that a קנין to divide is a קנין דברים. When ר"א אמר ר"י answered that שקנו מידם, it was their intent to say that it was קנו ברוחות. However the מקשן did not understand it as such. The מקשן thought that it means merely a קנין to divide. He therefore persisted to ask that it is merely a קנין דברים. The תרצן explained that ר"א אמר ר"י meant a קנין ברוחות.

[4] The reason the גמרא understood that if מחיצה גודא, the קנין was on שעבוד נכסים; however if מחיצה פלוגתא, the גמרא did not entertain the thought of קנין ברוחות, may be as follows: The term רצו should be taken in context for each case. In the case of גודא, the רצו was to build a wall. A willingness to build a wall indicates a commitment of money. Otherwise there is no willingness at all. This commitment cannot be effective without a קנין pledging his assets for the building of the wall. In the case of פלוגתא, the רצו is to divide. The commitment seems to be only in their willingness; there is no expenditure required. The קנין is in accordance with their willingness. Therefore the קנין is merely to divide. That is a קנין דברים. In addition just as by גודא, their commitment to build a wall is a general one, not specifying the type of wall; similarly one would assume that according to פלוגתא their agreement is general; not specifying the details of the division. A קנין on such an agreement is a קנין דברים.

[5] See בל"י אות מז.