רב אשי אמר כגון שהלך כולי – רב אשי said that for instance, one went, etc.

Overview

The גמרא is discussing the issue why the partners cannot renege on their agreement to divide the חצר. The גמרא answered that they made a קנין ברוחות, which binds them to their agreement. רב אשי offers an alternate explanation. They each actually made a קנין in their respective halves. It would seem more than obvious that once they were קונה their respective shares, they cannot renege. תוספות maintains that this answer is too obvious. It is stating that once they divided they cannot renege; but of course they cannot!

תוספות asks:

תימה לרבינו יצחק – The ר"י is astounded!

מה בא רב אשי להוסיף – what is רב אשי coming to add with his answer, that each of the partners made a חזקה in his respective share.

וכי איצטריך לאשמועינן – is it then necessary to inform us –

דחזקה מועלת כמו קנין – that a חזקה is as valid as a קנין[1]?! It is obvious that if each partner made a קנין חזקה in his part of the חצר, that they acquired it and they cannot go back on their agreement to divide.

תוספות answers:

ונראה לרבינו יצחק דהא קא משמע לן – The ר"י assumes that this is what רב אשי **is teaching us –**

דאף על גב דאמר לקמן בחזקת הבתים (נג,א) – that even though the גמרא **says later in חזקת הבתים** פרק, if someone wants to acquire a field through קנין חזקה, then if the חזקה is being performed -

שלא בפניו – not in the presence of the previous owner, then -

צריך למימר לו – it is required that the previous owner **say to him** before he makes the חזקה –

לך חזק וקני – 'Go make a חזקה and acquire the property for yourself. Otherwise, if he did not tell him this, and he made the חזקה not in the presence of the previous owner, the חזקה is invalid. The field still belongs to the previous owner.

The question arises, what would be in our case of חלוקת החצר. Are they required to say to each other לך חזק וקני (or make the חזקה in the presence of each other), or not. תוספות continues:

הכא – here in the case of חלוקת החצר –

כיון שאמרו אתה תקח רוח צפונית – since they said to each other, **you take the northern** half –

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[1] The term קנין is referring to קנין חליפין (סודר).

ואני רוח דרומית – and I will take **the southern** half –
והלך והחזיק לו כל אחד בשלו – and they subsequently **went and each made a חזקה in his** portion -
זה שלא בפני זה – not in the presence of the other, nonetheless –
נעשה כמי שקנו מידם ברוחות – it becomes as if they made a קנין ברוחות, in which case it is a valid קנין. Similarly here too it is a valid חזקה –
אף על פי שלא אמרו זה לזה לך חזק וקני – even though they did not say to each other 'לך חזק וקני'. The חזקה that each one made בתוך שלו is not the usual קנין חזקה. A usual קנין חזקה would not be valid since it took place שלא בפניו and neither said to the other לך חזק וקני. Rather the effect of the חזקה is in lieu of the קנו מידו. Just as by קנו מידו each partner is making a קנין whereby he is relinquishing his rights in the other half of the property and granting it to his partner; similarly in the case of שהלך וכו' והחזיק, this החזיק is a קנין that each partner only claims this half for themselves. The partners are relinquishing their rights to the other half and granting it to their respective partners[2].

Summary

רב אשי is teaching us that the קנין to divide can be either by specifically making a קנין to that effect, קנו מידו ברוחות; or by each of the partners making a חזקה in his share after they verbally agreed to divide the property (north and south). In the latter case too, they cannot renege on their agreement even though it was done זה שלא בפני זה and neither said to the other לך חזק וקני.

Thinking it over

1. Where is their a greater חידוש that they cannot renege on their agreement; in the case of קנו מידו ברוחות or in the case of הלך זה והחזיק וכו'?

2. What would be the דין in the case of רב אשי if there was only a general agreement to divide without specifying north and south, etc; could they renege on this agreement after they each made a חזקה?

3. What is the purpose of the חזקה in the הו"א of תוספות, as opposed to the מסקנא?

[2] This type of קנין does not require saying לך חזק וקני. That requirement is limited to cases where there is a new owner, who previously did not have any interest at all in this property. We are not certain that the previous owner is willing to give up his ownership unless he states so clearly; לך חזק וקני. In our case however, they are both partners; they each own (half of) the field. The קנין here is merely to effect their agreement of division. To accomplish this clarification as to their mutual relinquishing of interest in the property, לך חזק וקני is not required.