

THE YESHIVA PIRCHEI SHOSHANIM SHULCHAN ARUCH PROJECT

## Partnerships Shiur One

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### Mareh Makomos for this Shiur

Rambam (Laws of Partners, 4:1)

Baal Ha'ittur (Letter Shin, entry: Shituf)

Responsa of the Rif Siman 74

Ramban (Bava Basra 9a)

Responsa of the Rosh (Klal 89, Siman 12)

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# *What a Partnership is and how it is formed*



*Siman 176: Partnership, how it exists, how it functions and how it is dissolved, and if one of the partners dies. (Contains 51 Seifim)*

## *Siman 176 Seif One*

Partners that come to form a partnership, the partnership is not completed by words, meaning if they said “come, let’s form a partnership about this or about that,” in which they won’t be able to retract — this is not binding unless there is a purchase, and since this requires a purchase — everything is conducted according to the [appropriate halachic] purchase. Therefore, the coin [currency], which is not acquired by Chalipin, a partnership cannot be established through this [type of Kinyan, i.e., Chalipin]. Because even if it was acquired from both that the two should bring money and form a partnership, and they wrote a contract about this with witnesses, this is not effective. Rather, each has to put his money into the same pocket [sack], and both have to lift up the pocket. (x) There is an opinion that states that if each draws the other’s money toward them, this also establishes a partnership. And even if neither of these were done, rather they pooled their resources (z) and began engaging in commerce, either buying or selling, there is an opinion that says that this is effective.

*Rama: A person loans someone money and then tells the borrower; let that money remain with you as half of your payment and he loses the money by oness, he is obligated in all onassim just as he was initially (s), because the lenders’ words alone do not affect the borrower’s responsibility for guarding the money (Mordechai Perek HaChovel).*

Before we begin:

We are about to begin the subject of the laws of partnerships.

This is an extremely long subject, to which many lessons (*Shiurim*) will be dedicated. In the initial *Shiurim*, we will get acquainted with the concept of partnerships, how they are brought about and what are the rights and obligations of each of the partners involved.

# How is a Partnership Established?

## Introduction

In this *Shiur* we will learn how partnerships function in each of the types of partnerships that exist.

To this end, we'll first learn:

The **Rambam**, the **Rosh** and the **Tur** on this subject.

The subject:

This *Shiur* serves as the introduction for all of the initial *Seifim* of this *Siman*, and not just seif 1.

The source:

This *Halacha* is the **Rambam** (*Laws of Partners 4:1*).

As an introduction:

To all of the law of partnerships, we bring here the words of the **Rambam** as they are quoted in the **Tur**.

In the **Rambam** there, it is brought that partners who come to form a partnership, the partnership is not sealed by their words, meaning if they say “let’s form a partnership concerning such-and-such,” this does not bring about a situation in which they cannot withdraw from the partnership.

## Partnership with Kinyan

The partnership exists only by means of a *Kinyan*, an acquisition between the parties.

Since a *Kinyan* is necessary, attention must be given to make sure that the proper halachic *Kinyan* is done.

## Partnership with Currency

Therefore, currency (partnership based on joint use of currency), which is not acquired with a *Kinyan* (because currency is not acquired by a *Kinyan Sudar*, meaning the lifting up of a *Sudar* by the one conferring, due to a lack of resolve in a *Kinyan* of this nature, as we will learn about later, *iy"H*), the partnership is not affected by a *Kinyan Sudar* (which is a *Kinyan Chalipin*), and even if a *Kinyan Sudar* was made with both of them so that both would bring money to form a fund and a contract was written about this with witnesses, it is ineffective (because this is not the sort of *Kinyan* that works with currency).

A) How, then, is a currency-based partnership made?

The **Rambam**<sup>2</sup> writes that in order to form a partnership in which joint use is made of currency, each has to take his money and put it into a common fund (for example, one sack) and both raise the sack (thereby acquiring the partnership with a *Kinyan Hagbahah*, which is effective concerning currency).

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<sup>1</sup> *Kinyan Chalipin* – A Vehicle of Exchange whereby there is either an even exchange of items of comparable value in which one item acts as compensation for the other one or there is an uneven exchange of an item that has relatively little value but its primary purpose is to cause an acquisition of the other item which is being sold in order to affectuate the transaction.

<sup>2</sup> R' Moshe ben Maimon – Rambam – Born: Cordova, Spain, 1135. Died: Cairo, Egypt, 1204. Notes: Also known as Maimonides. Great Talmudic commentator, Halachic codifier and philosopher. Born in Spain, he had to flee right after his Bar Mitzvah and lived most of life in Egypt. A physician to the Caliph.

B) Does the money have to get mixed together in the sack?

1. The **Beis Yosef**<sup>3</sup> brings the opinion of the **Baal Ha-Ittur**<sup>4</sup> (*Os Shin*, Entry *Shituf*) who holds that despite the fact that the currency of each partner does not get mixed with that of the other, this is nevertheless a partnership and the profits are split between them.
2. However, he also brings there a Responsum of the **Rif**<sup>5</sup> (Responsa of the **Rif**, *Siman* 74) which differs with the **Baal Ha-Ittur** and holds that in order to be a partnership, both have to put money into one sack and mix the money together. If the coins do not become mixed, this is not yet a partnership according to *Halacha*.

The **Tur**<sup>6</sup> adds:

- 1) That there is another way to form a partnership with coins: if each pulls toward him the coins of the other person (*Kinyan Meshichah*), this is also effective for coins
- 2) Even if a *Kinyan Meshichah* was not done, and neither pulled the coins of the other toward him, rather they placed their money together in a general sense and began doing business with the joint sum, buying or selling; it seems that this is also an effective way of becoming partners in the money-based partnership.

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<sup>3</sup> . R' Yosef Karo - Born: Toledo, Spain, 1488. Died: Safed, Israel, 1575. Also known as the *Mechaber* (the Author). He is one of the most authoritative Talmudists and codifier of Halacha whose decisions have been accepted as binding in Jewish Law. Born in Spain just before the Expulsion, he was exiled with his family in 1492.

<sup>4</sup> Baal Ha-Ittur – R' Yitzchak ben Abba Mari – Born: Provence c. 1122. Died: Marseilles, Provence, c. 1193. From the age of 17 for over a decade wrote on 3 sections of Halacha. The sources of these works were primarily from the Talmud Bavli and Yerushalmi and Geonic responsa. In his introduction to the *Sefer Meah Shearim*, R' Yitzchak applies to the Rif the verse from *Maldai* 2:7, "The lips of the Kohen guard knowledge; and Torah is sought from his mouth."

<sup>5</sup> Rif – R' Yitzchak Ben Yaakov HaKohen Alfasi - Born: Kila Chamad, Algeria, 1013. Died: Lucena, Spain, 1103. Notes: Talmudist and first halachic codifier. Student of R' Chananel and R' Nissim in Kairouan. Active in Fez, Morocco until age 75, when he fled to Spain.

<sup>6</sup> Tur – Rabbi Yaakov ben Asher Born: Cologne, Germany, c. 1275. Died: Toledo, Spain c. 1349. Notes: Torah commentator, Talmudist and Halachic codifier. The third son of the Rosh and a student of his father, his older brother Yechiel, and the Rashba. A pietist who refused to take a position as Rabbi and only became member of the Toledo Bet Din after his father's death. Author of *Arba Turim*/The Four Rows, Code of Jewish Law that bridged the gap between the French and Spanish schools and formed the basis for the *Shulchan Aruch*.

## Partners in Chattel

Until now, we've spoken about partnership with coins, or currency (concerning which a *Kinyan Sudar* does not work). Now we will explain how a partnership based on chattel, movable items, is formed.

The Rambam writes:

When two form a partnership concerning a chattel (in which each brings a different movable item to do business with and then divide the profits), since an acquisition was made (with a *Sudar*) that one would bring his barrel of wine and the other his pitcher of honey, with this they've become partners in these two items. So, too, if their fruit became mixed (as in the case of coins above) or they rented a common area, and one placed his barrel of wine there and the other his pitcher of honey so that they would become partners in the items — they are now partners (the rented area acquires for them the partnership based on the law of *chatzer*; yard, because a man's yard or private domain acquires for him).

We've now learned that mixing fruit together in a sack is a way to form a partnership in chattel. The questions are:

- 1) Why is the act of mixing alone sufficient, whereas by coins we learned above that in order to form a currency-based partnership each has to bring his coins, put them into a common fund (one sack) and both must lift up the sack?
- 2) Why, in this case, is it not enough merely to put the coins in and not do *Hagbahah*?

These questions are raised by the **Bach**<sup>7</sup> in this *Siman*. The **Bach** explains this as follows:

- 1) Concerning money, since profits do not arise from the coins themselves but rather from profits that results from commerce done with them (i.e., what will be bought with this money), the act of putting in the coins themselves is not enough — another act is needed to make it clear that there is now a change in the coins.

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<sup>7</sup> **Bach – R' Yod Ben Shmuel Sirkes** - Born: Lublin, Poland, 1561. Died: Cracow, Poland, 1640 Served as Rav of Beltz, Brest-Litovsk, and Cracow where he became Av Bet Din and Rosh Yeshiva in 1619. Author of *Beis Chadash/The Bach*, a major commentary on the *Tur*, where he establishes the source of the laws in the Talmud and traces their developments through the interpretations of the different generations.

- 2) This act is *Hagbahah*, which shows that these coins have been used to form a partnership. Concerning other items, however, such as fruit, where the profit comes from the fruits themselves, the act of mixing the fruit together is enough of a sign of change for us.

## Partnership between Craftsmen

Until now, we've learned about partnerships concerning items that can generate a profit for their owners. Now we will explain how to form a partnership not concerning objects but rather labor.

For example:

Two tailors who want to make an agreement that all of their monthly earnings be divided evenly between them. How is such a partnership made?

Concerning this, the **Rambam** writes that craftsmen that join together in their trade, even though the two make a *Kinyan Sudar*, they are still not partners.

The Rambam brings an example:

If two tailors or weavers make an agreement that what either will earn from practicing his trade will be split by the two evenly — this is not a partnership. Explains the **Rambam**: A person cannot confer something that has not come into the world (and in this case, the craftsmen are not conferring tangible items that are before them, as in the case of coins or fruit. Instead, they seek to confer future profits, profits which have not yet come into the world, and we have a rule, that a sale of something that has not yet come into the world is not an effective sale).

How, then, can these two craftsmen form a partnership?

The **Rambam** continues that if the two were to buy clothes with their own money and sew them and sell them, or to buy the woof and the warp (the threads) with their own money and weave and sell, and they were the ones who put their money together to buy the threads and the items, these are partners, and whatever they earn with their labor and sales is split

evenly. The main thing is that the partnership concerns not only profits but also the capital that they already had. With this capital, a partnership can be formed after which they split profits evenly.

## The Approach of the Raavad

As we shall see, the **Raavad**<sup>8</sup> did not agree with the approach of the **Rambam** that a *Kinyan* between craftsmen cannot be made because of the problem of “something that has not come into the world.”

The **Raavad** objects to the **Rambam**'s approach, writing that his teachers instructed that a person can confer *himself* as a *Kinyan* (i.e., he makes *himself* obligated to work for the sake of dividing profits with his fellow. This is because the body that accepts upon itself this obligation, which is the person itself, *is* in fact in the world).

The **Ramban**<sup>9</sup> (Bava Basra 9a) holds like the **Rambam**, writing: Two that made a condition between them: “Any profit we make will be split evenly,” this is no condition, and there is no place for the condition to take effect, whether the condition was made about what they would earn as craftsmen or what they would earn in sales — in all cases, they can retract.”

We see that the **Rambam** and **Ramban** both hold that a regular *Kinyan* of the profits of a partnership (without the solution offered by the **Rambam**) is ineffective, unlike the opinion of the **Raavad**.

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<sup>8</sup> **Raavad III – R' Avraham Ben David of Posquieres – Born:** Narbonne, Provence, c. 1120. **Died:** Posquieres, Provence, 1198. **Notes:** Talmudic and Halachic scholar, he was the foremost authority of his time in France. Being of great personal wealth he is known to have lived a very modest life and personally supported many needy students in his Yeshiva in Posquieres. Author of *Tenim Dein/Perfect knowledge*: a compendium of responsa, of *Hasagot HaRaavad*, glosses to the Rambam where he lists sources for the laws, a book where he argues with the Baal HaMaor in defense of the Rif, of commentaries on Sifra and on Mishna Eduyot and Kinnin, of *Baalei HaNefesh/The Book of the Scrupulous*, on family purity. He was somewhat critical of codifications being afraid that they would detract from studying the Talmudic sources.

<sup>9</sup> **Ramban – R' Moshe Ben Nachman – Born:** Gerona, Spain, c. 1194. **Died:** Israel, c. 1270. **Notes:** Also known as Nachmanides. Great Biblical and Talmudic commentator, Kabbalist, and Jewish leader, and a physician and linguist by trade

## The Approach of the Rosh

The **Tur** writes that from the words of the **Rosh** (Responsa of the **Rosh**, *Klal* 89, *Siman* 12), it seems that he takes the approach of the **Raavad** (that the partnership between the craftsmen does take effect).

## The Rosh<sup>10</sup> Brings a Question:

Reuven, Shimon and Levi were partners in everything — the work of their hands [i.e., their labor] and sales. All three worked with leather.

- a) After some time, they agreed that they would be partners in everything except the work of their hands. Their intent was that each would earn his livelihood on his own (and they would only be partners in merchandise but not in profits).
- b) Afterwards, while they were still in this new sort of partnership, a non-Jew gave Reuven hides to process [i.e., a different sort of work], and during the time that Reuven worked on the hides, he did not engage in leatherwork.
- c) When he finishes, his partners come and ask for their shares of what he earned from the hides, claiming that the only thing they removed from the partnership was profit from leatherwork, but profit from another type of work was still included in the partnership, and Reuven has to share with them the earnings from the processing of the hides.

Reuven counters:

All I wanted was that each of us should be able to earn his livelihood by doing his craft. What's the difference if I prepare hides or work with

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<sup>10</sup> *Rosh* – Rabbi Asher ben Yehiel Born: Germany, c. 1250. Died: Toledo, Spain, 1327. Notes: Talmudist and Halachist, one of the most important in Jewish history. He was a descendant of the Meor HaGolah and a leading student of the Maharam M'Rottenberg and his successor as the leader of Germany. Left Germany in 1303 in the aftermath of the Rindfleish massacres and was welcomed by the Rashba in Barcelona. Became Rav and Av Beis Din of Toledo in 1305 and became the leading authority in Spain after the death of the Rashba.

processed leather — all of the profit should go to the one who did the work, and not to the partnership.

## The Rosh replies:

Reuven is right:

When they said the words “the work of their hands” in a general sense, that concerning this there is no division of profits, then processing hides is also the work of one’s hands, and if they meant only the act of working with prepared leather alone, they should have stated this explicitly, because it is normal for a man to try to work in all the trades that he is able to do.<sup>11</sup> Therefore, they should have stated clearly that the type of work they meant (concerning which profits would not be divided) was leatherwork alone. Since they made no such explicit statement, they are the ones who lose out.

An additional claim for Reuven raised by the Rosh:

It is illogical from a legal standpoint that they should do their own work (while having nothing to do with what Reuven does and he should do his work and give them some of the profit and die of hunger. Rather, the **Rosh** concludes there that all profit from processing of hides belongs to Reuven alone.

## If so, how is it that the Rosh holds like the Raavad?

The Prisha<sup>12</sup> (*Seif Katan 5*) explains as follows:

The **Rosh** writes that the first claim against the two partners is as follows:

“If you had meant only leatherwork, you should have made this clear, because it is normal for a man to try to work in all the trades that he is able to do.<sup>13</sup> Therefore, they should have stated clearly that the type of work they meant (concerning which

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<sup>11</sup> *And they should have taken into account that one of them might engage in a different type of work and earn money at it.*

<sup>12</sup> *Prisha - Sma- R' Yehoshua Ben Alexander HaKohen Falk - Born: Lublin, Poland, c. 1550. Died: Lemberg, Germany, 1614. Notes: Talmudic scholar and Rosh Yeshiva in Lemberg. Author of D'risha u Prisha, twin commentaries on the Tur, Sefer Me'iras Einayim/SMA/The Book that Enlightens the Eyes, a commentary on Shulchan Aruch Choshen Mishpat, included in the standard editions of the Shulchan Aruch.*

<sup>13</sup> *And they should have taken into account that one of them might engage in a different type of work and earn money at it.*

profits would not be divided) was leatherwork alone. Since they made no such explicit statement, they are the ones who lose out.”

- a) It would seem, at first, that had the other two partners stated explicitly from the outset that the work of processing hides is included in the partnership, they would have been right by law and Reuven would have had to give them a share of the profit. Still, why should Reuven have to pay them (if they stated this explicitly)?
- b) Can't he claim: "I retract from this partnership concerning processing of hides."
- c) Because this agreement was based on words alone, and this is something that has not yet come into the world, about which the partnership does not apply?

Rather, because Reuven cannot say this, it is clear that the **Rosh** holds like the **Raavad** that this condition stated by the craftsmen is binding, even without a *Kinyan* (and the issue of it being something that has not yet come into the world is not a problem, because their bodies have come into the world). Therefore, the **Rosh** holds like the **Raavad**.

In the next *Shiur*, we will bring the rulings of the **Shulchan Aruch** and **Rama** on the first *Seifim* of this *Siman*.

## Questions and Answers

**1. Can a partnership take effect on the basis of words, i.e., verbal agreement, alone?**

A partnership is not founded with words, meaning if they say “let’s form a partnership about such-and-such,” this does not mean that now, neither of the two can retract and leave the partnership.

A partnership is only established through a *Kinyan* between the two sides.

**2. Is it possible to form a partnership based on currency with a *Kinyan Sudar* alone?**

No. Currency (i.e., a partnership based on pooling money) is not acquired with a *Kinyan Sudar*; and even if a *Kinyan Sudar* is made from both of the partners that they should put their money into a fund, and a contract is written on this and witnesses testify about it, none of this helps (because this is not the type of *Kinyan* that works with currency).

**3. How is a partnership based on currency established?**

In order to form a partnership based on currency, each has to bring his money, put it into one pocket or sack and both must lift the bag or sack (and thereby acquire the currency by *Hagbahah*, which is effective in acquiring money).

**4. Must the currency mix together inside the pocket or sack?**

The **Baal Ha’ittur** and the **Rif** disagree on this question. The **Baal Ha’ittur** holds that even though the partnership money of each did not mix with that of the other, this is a partnership and the profits are divided equally. The **Rif**, however, holds that in order for this to become a partnership, the two must both put money into a pocket or sack together so that the money becomes intermingled, and if this does not happen, this is still not Halachically called a partnership.

**5. Is putting money into a sack what affects a *Kinyan* of money, or is it *Meshichah* that does this?**

No, even if the partners do not do *Meshichah* but put money together in a general way and begin trading with the money, buying or selling; this is also an effective way of establishing a partnership based on currency.

**6. How is a partnership established with chattel?**

If an acquisition was made from each by means of a *Sudar*; that one will bring his barrel of wine and the other his jar of honey, this forms a partnership. So, too, if they mix together fruit (as was done with currency) or they rent an area together where one put down his barrel and the other his jar, this also makes the two into partners.

**7. To form a partnership, is it necessary to do both *Hagbahah* and placing into a sack?**

Concerning currency, since the profit comes not from these coins themselves but rather what is done with them, another act of recognition should be done with the currency — *Hagbahah* — so that it is recognized that they formed a partnership with these coins. But concerning other things, such as fruit, in which the profit comes from the fruits themselves, it's sufficient that the fruit is mixed together (The **Bach**).

**8. How is a partnership made concerning profits from labor? For example, two tailors that want to make an agreement that all of their monthly profits be split evenly between the two of them. How is such a partnership carried out?**

The **Rambam** holds that craftsmen that make a partnership out of their craft, even though a *Kinyan Sudar* is done with all of them, this is still not a partnership, because a person cannot confer what has not yet come into the world. How, then, do they make such a partnership? If they buy material and make clothes from it and sell it, or buy the wool and the warp with their currency and weave something and sell it, and it was their combined money that purchased the threads and the materials, these are partners, and whatever they earn in their craft and sales is divided equally (the partnership is not just concerning profits, but also the very money that they combined, and with money it is possible to form a partnership, so they clearly will split profits afterwards).

**9. What is the opinion of the Raavad of the above?**

The **Raavad** disagrees with the **Rambam**. In his opinion, a person can confer himself in a *Kinyan*, and there is no problem of this being a thing which has not yet come into the world (a person can obligate his body, as it were, to split profits with his partner, and since his body is what now bears this legal obligation, the *Kinyan* is valid because the man's body has "come into the world").

**10. What is the position of the Rosh concerning the disagreement between the Rambam and the Raavad?**

The **Rosh** holds like the **Raavad**, and this is how it is brought in the **Tur**. According to the **Prisha**, this can be inferred from the words of the **Rosh**, that if the two other partners (in the story brought by the **Rosh**) had stated explicitly at the outset that processing of hides would be included in the partnership, they would be legally justified in demanding that Reuven split his profits with them. But even if they stated so explicitly, why does Reuven have to split this profit with them? Why can't he claim: "I retract from this partnership concerning profit from processing of hides," because this agreement was only formed by words, and the words dealt only with profits that had not yet come into the world? Rather, since Reuven cannot say this, it means that the **Rosh** holds like the **Raavad**, that this condition between craftsmen is effective even without a *Kinyan* (And there is no problem of this being a "thing that has not come into the world," because the partners' bodies are "in the world"), and the **Rosh** clearly holds like the **Raavad**.