

Buyer Vs. Seller; Who Takes The Loss For Damaged Items?

Rav Eliezer Cohen

Question 1: On Erev Pesach, an individual made a last-minute order of meat for Yom Tov and paid in cash. The store sent him the meat through a delivery service but it got destroyed somehow during transit. Who has to bear the loss?

Question 2: An esrog dealer ordered a shipment of esrogim from an orchard overseas and paid in cash. The orchard shipped them to him via a 3rd party shipping company, and they were lost at sea. Does the dealer have to pay for the lost shipment?

Answer: As we said, cash payments do not work as a *kinyan* on movable items; however, the Gemara says clearly that there are exceptions to the rule. One of the exceptions is on Erev Yom Tov, when business is usually done quickly and in cash, such a payment would instantly transfer ownership of an item.

We can therefore rule that in the case of the meat order placed on Erev Pesach itself, a cash payment would be *koneh* and the buyer would immediately become the owner of the meat. Once the item is shipped, if the seller does not accept responsibility for the shipping, the buyer would have to bear the loss if the meat gets ruined.

The answer to the other question may be different. Obviously, the esrog dealer ordered his merchandise to arrive well before Succos, so we are not talking about a case of Erev Yom Tov. The Pischei Choshen discusses whether the exception of Erev Yom Tov literally applies only to the day before Yom Tov or applies to anything Yom Tov related, and he concludes that it only is applicable to the actual day before Yom Tov. This would mean that in the case of the esrog dealer, the cash payment would not constitute a *kinyan*, and the merchandise still belonged to the seller when it was lost. It is important to remember that all of this is only true when there was no *kinyan* made besides for the cash payment. If another valid *kinyan* was made, the merchandise would transfer to the buyer's possession and he would have to take the loss.

Having said this, we must mention the words of the Mishpat Shalom, which may drastically change many of the halachos we have discussed in the past few segments. The Mishpat Shalom points out that the common custom works as a valid *kinyan*, meaning that if it is common practice in a certain area to transfer ownership with a certain action, that action would serve as a good halachic *kinyan*. Accordingly, he states that even though Chazal decreed that a cash payment is not a valid method of transferring ownership, it still may work as a *kinyan* in contemporary times because the common custom nowadays is to accept it as such.

According to the Mishpat Shalom, the halacha would be that cash is *koneh* in any place where that is the common practice, and the buyer would become the owner as soon as he gives his payment.