

# Shluchin

## PART I

Rav Boruch Meir Levin, Dayan at the Bais Havaad

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

### THE DISPUTE

Two individuals decided to engage in a joint real-estate venture together. They wished to purchase an apartment building with the following division of responsibilities: One of the partners would focus on finding a suitable piece of property, negotiating with the seller, and dealing with the bank and the attorneys (“the buyer”), while the other would deal with investors and managing the property following the purchase (“the manager”). They found a building, evaluated it together, and came to an agreement with the seller but did not yet sign a contract. Each of them performed their responsibilities as they had agreed to; the buyer negotiated a deal with the seller and worked on securing financing, while the manager attempted to find different vendors to service the property following the sale and potential investors

At one point during this period, the manager was not able to reach the buyer for several weeks. He later discovered that the buyer had gone ahead with the signing of the contract alone without informing the manager. Soon after, he found a third party who was willing to pay one million dollars more for the property than the buyer had agreed to. This third party then paid the buyer one million dollars to transfer the contract to his name. The buyer now claimed that although he had originally agreed to engage in the venture together with the manager, he later decided to follow through with the sale on his own. As a result, he argued that he only owes the manager a small amount for the work he had done up to that point, but the rest of the million dollars he received from the third party belonged entirely to him. The manager, on the other hand, claimed that the million dollars should be split equally between them since the buyer had signed the contract on behalf of the partnership

### A CLASSIC CASE OF A SHALIACH THAT CHANGES HIS MIND

To determine the halacha in this dispute, we need to analyze some of the relevant principles within Hilchos Shluchin. According to the Gemara Kiddushin (59a) and the Shulchan Aruch (C.M. 183:2), if a *meshale'ach* (sender) gives money to a *shaliach* (messenger) to purchase an unspecified piece of real estate but the *shaliach* proceeds to purchase it with his own money, the sale is valid and the *shaliach* owns the item or property. However, the *shaliach* is considered a *ramai* (cheater) because he purchased it for himself after agreeing to do so for the *meshale'ach*. In our case as well, the buyer claimed that he decided to purchase the property alone before signing the contract and used his own money for the purchase. If this is correct, then he owns the property and the profit of one million dollars belongs to him, though he is considered a *ramai*. However, if he signed the contract on behalf of the partnership that he had established with the manager, then he may not later claim that he is the sole owner, as the property belongs to the partnership

### INSTRUCTIONS TO PURCHASE A SPECIFIC PROPERTY: THE OPINION OF THE REMA

The Rema (based upon the opinion of the *Ran*) comments on the ruling of the Shulchan Aruch that if the *meshale'ach* instructed the *shaliach* to buy a specific piece of property, the *halacha* is different. Since a *shaliach* who is instructed to purchase a specific property on behalf of another and then purchases it for himself has engaged in a serious act of deceit, we do not accept his claim that he would do so. Instead, we assume that he in fact bought it for the *meshale'ach* and he must transfer ownership to him. If we apply the same logic in our case, which indeed is also a case of purchasing a specific piece of property, then we would say that the buyer is not believed to say that he changed his mind and purchased the property for himself since that constitutes an act of deceit. Rather, we would assume that he purchased it for both partners equally and they would need to split the profit

Practically, it can often be determined whether the intent of the buyer was to purchase the property for himself or for the partnership. For example, if the buyer used his own money for the deposit that he gave when signing the contract, that would indicate that he purchased it for himself and he would retain the profits. If he used the money set aside for the partnership, then that would indicate he intended to purchase it on behalf of both partners (see Shulchan Aruch 183:3), and they would split the profits. However, this method was ineffective in our case, since the two partners had agreed that the buyer would lay out the money for the initial deposit on his own. Another method would be to identify who signed the contract. But here, too, in our case this method could not be used, since the buyer used a "shell entity" to sign the contract, and it was unclear whether he had created it for himself alone or for both partners

### **:THE CONTRADICTION WITHIN THE REMA**

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According to what we have seen so far, it would seem that based upon the Rema, even if the buyer truly intended on purchasing the building on behalf of himself, he would have to split the profits with the manager. However, the Rema (C.M. 183:4) appears to contradict himself concerning this point. The Rema discusses a case mentioned in the Mordechai where Reuven gave Shimon money and instructed him to purchase some cheap merchandise with it. Shimon made the purchase and did not say anything to Reuven about it, indicating by his silence that he intended to execute the instructions given to him. Later, though, Shimon claimed that he purchased the merchandise for himself. The Rema rules that if he used his own money for the purchase, then it belongs to him and he is believed to say that he purchased it for himself, though he is considered a *ramai*. According to this ruling of the Rema, the *shaliach* is believed to say he purchased it for himself, which apparently contradicts the aforementioned ruling of the Rema that he is not believed to claim that he engaged in such an act of deceit

### **RESOLUTIONS TO THE CONTRADICTION WITHIN THE REMA**

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The Acharonim offer a number of answers to this contradiction that will likely determine the halacha in our scenario as to whether the buyer is believed or not. The

Nesivos HaMishpat writes that there are two reasons mentioned by the Rishonim for the Rema's ruling that the *shaliach* is not believed. The first is mentioned by the Ran (the source of the Rema) that we do not believe the *shaliach* would engage in such a deceitful manner to take the same property for himself that the *meshale'ach* instructed him to purchase on his behalf (similar to the principle of *ein adam meisim atzmo rasha*, that a person cannot incriminate himself), and the second is that we assume he performed his *shelichus* properly (*chazakah shaliach oseh shelichuso*). However, these two factors do not apply in the second case of the Rema. The first reason does not apply because the basis for categorizing such a person as a *ramai* is due to the principle of *ani mehapeich b'chararah*, which according to the Gemara (Kiddushin 59a, immediately following the discussion cited above) forbids a person from taking an item away from someone else who has already begun to acquire it. However, the Nesivos notes that this principle does not apply in cases of a "*metzia*", a lost object or where the merchandise was atypically cheap. Thus, since in the second case of the Rema taken from the Mordechai, the *shaliach* was attempting to capitalize on a sale and purchase cheap merchandise, the notion of a *ramai* does not apply and the *shaliach* is believed that he purchased the item or property for himself. The second reason also does not apply since the principle of *chazakah shaliach oseh shelichuso* does not necessarily dictate that Shimon use his own money to purchase an item for Reuven, which is in essence giving Reuven a loan. This is not something that we are to assume Shimon would do, as he may have changed his mind and decided not to lend him money. Rather, it only presumes that Shimon would use money given to him by Reuven to purchase an item for Reuven

According to the explanation of the Nesivos, our scenario would seem to be more comparable to the case of the Mordechai. The buyer felt that earning a profit of a million dollars was an unusual circumstance and a tremendous opportunity. Therefore, the assumption that a person is not believed to engage in an act of deceit would not apply here since it is not deceitful to capitalize on such a potential profit. Plus, the assumption that the *shaliach* performed his *shelichus* is not relevant when using his own money to make the purchase

However, the Taz offers a second resolution to the contradiction. According to the Taz, the Mordechai refers to a case where Reuven did not have sufficient money of his own to make the purchase. For this reason, he asked

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## PART I (CONTINUED)

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Shimon to purchase it for him with his own money and Reuven would repay him later. In such a case, then, Shimon is not considered a true *ramai* (though he is guilty of tricking Reuven and not informing him of his plans beforehand), because Reuven was unable to purchase the merchandise on his own in any case. According to the Taz, in our scenario the manager may have been able to purchase the property on his own if the buyer had informed him that he did not wish to lay out the money. If so, then it is more comparable to the first ruling of the Rema, and the buyer would still have to split the .profit

The Bach proposes a third answer to the contradiction. In the first case, the terms of the agreement were clear and the *shaliach* did not follow them. For this reason, we do not believe that he engaged in such an act of *rama'us*. In the case of the Mordechai, though, the terms of the agreement were not clearly agreed upon and therefore we believe Shimon when he says he intended to purchase it for himself. According to this answer, our scenario may possibly have been similar to the first ruling of the Rema, since the buyer and manager did have some working framework and agreement (though the extent of the terms was not entirely clear), and the buyer would therefore likely be compelled to share his profits as he .is not believed to claim that he purchased it for himself

### THE KEY TO THE PUZZLE: UNDERSTANDING THE MOTIVE

Up to this point, we have suggested that the halacha in the scenario with which we began depends upon which interpretation of the Rema is accepted. However, there is one final relevant point that may allow us to suggest that all opinions would agree to the halacha in this case. It is difficult to understand the first ruling of the Rema. By assuming that the *shali'ach* purchased the property for the *meshale'ach* because we do not believe that he engaged in an act of *rama'us* that he purchased it for himself, then if he refuses to transfer ownership to the *meshale'ach*, we are instead incriminating him with a worse crime: being a *gazlan de'oraisa* and a liar, since he clearly does not wish to give the property

over unless the *bais din* forces him to do so?? Rav Aharon Leib Shteinman in his sefer *Ayeles HaShachar* raises this question, and it is indeed a major difficulty with the opinion .of the Ran and the Rema

One answer that has been suggested is that the *shaliach* has a *chezkas haguf* (type of halachic presumption) that he was an upright, honest person until the latest possible time that he could have acted inappropriately, similar to the *chezkas haguf* that exists for a *mikvah* that it is kosher until the latest possible time that it was discovered to be *pasul*. Although the cases are not entirely similar, we do see that in our case we have a *chazakah* that the *shaliach* performed his *shelichus* or a *chazakah* that he would not act in an improper fashion, .and yet we see that ultimately he did not act in that fashion

Perhaps we can suggest that if we can identify a certain point in time when it is logical to assume that the *shaliach* changed his mind and decided to act improperly, then we can rely on such an *umdena* (assessment) in determining the halacha. Thus, in our case, it seems logical that the buyer freely admitted that he wanted a manager to partner with because he was not proficient in dealing with the daily upkeep of the building. However, as soon as he realized that he could earn a greater profit by reselling the property, he was no longer interested in retaining the manager as his partner. Until that point, we would not believe that he deviated from following the agreement, as the Rema says. But since he later refuses to allow the manager to receive half of the profit, we can assume that the change of heart took place at the time of the offer to purchase the property for a million dollars. If so, then it is logical to assume that when the buyer signed the contract to purchase the property, he did so on behalf of the partnership, and he only changed his mind when presented with the offer to purchase it from him. According to this, all opinions would agree that he must split the million dollars .with the manager

:To watch the video or listen to the shiur given by the Dayan, visit [www.baishavaad.org/yorucha-topics](http://www.baishavaad.org/yorucha-topics)  
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