



Baila (Plaintiff) vs. Amos (Defendant)

Names and dates have been changed to preserve anonymity of parties

Synopsis:

The case deals with a wedding ceremony where there were no qualified witnesses present to testify to the Kiddushin.

Facts of the Case:

In June 1983, Baila married Amos. The kiddushin (halakhic betrothal) was finalized when the hatan, (groom) placed a ring on the index finger of the kallah's (bride's) right hand while pronouncing "harei at mekuuddeshet li betaba'at zo, kedat Moshe ve-Yisrael." Based upon viewing the video of the kiddushin ceremony which occurred under the hupah, the following individuals were under the hupah: the hatan and kallah, the hatan's mother and sister, and the kallah's father, mother, brothers and sister. Except for these relatives who were present at the time of the giving of the ring, the only other non-relative present was the Rabbi, who was mesadair kiddushin, overseeing that the proceeding would be conducted in accordance with Torah law.

Many years later on December 20, 2010, Baila requested a get at Rabbi Turk's beit din and in August 2014, a civil divorce was executed. However to this date, Amos has refused to give her a get.

Discussion:

A *sina qua non* to create the *ma'aseh kiddushin*, the act of halakhic betrothal, is the presence of two adult Jewish males who are qualified (i.e. unrelated to the hatan and kallah) and Torah observant¹ and will testify that the hatan gave a ring to the kallah. If needed, these two *eidim*, witnesses, may be called upon to serve as *edei re'ayah* to confirm in a *beit din* that in fact the execution of *kiddushin* was done in pursuance to the dictates of halakhic marriage law.² Moreover, these two individuals serve as *eidei kiyum* who by dint of their presence and participation under the *hupah* impart validity to the act of the *kiddushin*. Whereas, the *mesadair kiddushin* serves as the *mashgiach*, the supervisor, the two witnesses are an integral part in establishing the *kiddushin*. In their absence or if they are present but they are ineligible to testify, the act of *kiddushin* cannot be created.³

¹ Shulhan Aruch, Even Haezer 42:2,5.

² Kiddushin 65b; Teshuvot Hatam Sofer Even Haezer 1 (100).

³ Kiddushin 65a-b; Shulhan Aruch, Even Haezer 42:2; Rema, Even Haezer 42:4; Iggerot Moshe 1:82; Piskei Din Rabbanayim 1:19-22, 10:175, 180-182; 13: 303, 310.

According to the Hatam Sofer, even in the absence of two witnesses or in the presence of two disqualified witnesses, Torah committed Jews who observed the kiddushin ceremony but who did not see the actual mesirah (the giving of the ring by the hatan to the kallah), may serve as “anan sahadei,” (translated as we are the witnesses for the kiddushin). Even the presence of non-observant Torah Jews as onlookers of the kiddushin ceremony will not invalidate the testimony of the other Torah observant Jews who are onlookers there.⁴ Given that at this wedding, the guests at the ceremony were both Torah observant and non-observant Jews, seemingly we may rely upon Hatam Sofer’s position that the act of kiddushin has been established.

Nonetheless, many poskim, authorities of halakhah reject this approach.⁵ Among the poskim in contemporary times who aligned himself with this view of rejecting the Hatam Sofer is Rabbi Tzion Boyaron who presently serves as a dayan on the Bet Din ha-Gadol.⁶ Moreover, invoking “anan sahadei,” is predicated upon the fact that the mesadair kiddushin is Torah-observant in general and proficient in the halakhot of seder kiddushin venissuin (the engagement and marriage ceremony) in particular.⁷ For example, the mesadair kiddushin in this case executed a double ring ceremony where the hatan gave a ring to the kallah and recited the prescribed halakhic text for kiddushin, “harei at mekudeshet lee...ve’yisrael” and the kallah gave a ring to the hatan and stated “ani le’dodi ve’dodi li.” Such an exchange of rings is against halakha.⁸ Therefore, the absence of two witnesses and the execution of a double ring ceremony for kiddushin in our case preclude one from invoking “anan sahadei.”

Despite the halakhic shortcoming of the absence of two witnesses, nevertheless may one invoke the rule of “ein adam oseh be’ilato be’ilat zenut, a Jew does not engage in sexual relations as an act of fornication, in order to invoke kiddushin in this case? Consequently, the act of biah, intercourse, would consummate the marriage. Firstly, today we do not practice “Kiddushei Bi’ah.”⁹ Applying this rule presumes that the couple were religiously committed to a Torah way of life including compliance with the halakhot of family purity at the time of the marriage.¹⁰ In our case, the couple did not comply with the halakhot of family purity. The mere living together as a husband and wife leshem ishut of kiddushin, to be conscious that the both are living together to the exclusion of others based upon a halakhic imperative rather than cohabitating with each other devoid of halakhic intent is the desideratum.¹¹ Even if the couple lived for an extended period of time in a Torah observant community and are known at large as a married couple and Torah observant (including practicing the halakhot of family purity), nonetheless we will not construe their cohabitation as a form of kiddushei bi’ah. Said conclusion is in consonance with Rabbi Feinstein’s view who contends that public knowledge that the man and woman are living together a Torah lifestyle is sufficient to deem them halakhically married provided that there are members of the community who know that they actually married in pursuance to halakha. See Iggerot Moshe EH 1:75.¹²

It is our understanding that at the inception of marriage, the couple were nonreligious and therefore the rule of “ein adam oseh be’ilato be’ilat zenut” cannot be applied.

Decision:

Given the absence of two witnesses at the kiddushin who can testify to a valid netinah, the giving of a ring by the

⁴ Teshuvot Hatam Sofer Even ha-Ezer 1:100.

⁵ See Teshuvot Mishpetei Shmuel 20; Teshuvot Shem Aryeh 1:31; Teshuvot Tzit Eliezer 8:37 in the name of Maharil, Maharshach and Emunat Shmuel; Teshuvot Ohr Lee 73b; Teshuvot Ein Yitzhak 2:64.

⁶ Teshuvot Sha’arei Tzion 2:11.

⁷ Teshuvot Shem Aryeh 31; Iggerot Moshe Even ha-Ezer 1:76-77; Teshuvot Tzit Eliezer 8:37.

⁸ Iggerot Moshe EH 4:13 See also 3:25.

⁹ See Sha’agat Aryeh, Addendum to the Sefer cited by Tecshuvot Beit Ephraim EH 62.

¹⁰ Teshuvot ha-Rivash 6; Teshuvot Terumat ha-Deshen 209; Mishnah Lemelech, Gerushin 10:18; Teshuvot ha—Radvaz 1:351; Shulhan Aruch, Even ha-Ezer 26:1, 33:1

¹¹ Iggerot Moshe Even ha-Ezer 1: 74-77; Teshuvot Beit Avi 5:133.

¹²And in our case, it is clear that the couple was not married in accordance with Halakha.

hatan to the kallah while pronouncing aloud the amirah (“harei at...”), the act of kiddushin was never consummated. Therefore, Baila is free to remarry, even a Kohen, without receiving a get.