

A Defective Sheital and the Chasuna is Tommorow!

Q: My wife recently purchased a brand new *sheital* for my sister's wedding. Everything seemed perfect as she wore the *sheital* the past few weeks. To our great dismay, my wife just noticed that the *sheital* is missing some hair and is a defective product. My wife is adamant about returning this *sheital* but we are in a very uncomfortable bind. On the one hand, tomorrow night is the *chasuna* and this is the only appropriate *sheital* that she has for such an occasion. There is no time left to get a new *sheital* in time for the *chasuna*. On the other hand, she clearly wants to return this *sheital* as it has a defect. Is she allowed to wear this *sheital* once she has decided to return it and if she wears it can she still return the *sheital* for a full refund?

A: This is a classic example of a *mekach taus*- a mistaken transaction. The *Shulchan Aruch* states that one who purchases an item and later realizes that it has a *mum*- a defect, may return the item even after many years[1]. However there are a few important conditions that must be met in order to be able to return this item:

1. **Knowledge and Usage:** As long as the consumer did not have knowledge of the defect at the time of the sale or at the time of the usage, he may return the item. If however, the consumer realized that there was a deficiency and still purchased the item, or the consumer only realized sometime after the purchase but continued to use the item, the usage indicates that the consumer is *mochel* - forgives the imperfection. The sale is therefore deemed valid as is. The consumer has forgiven his rights to return the object[2].
2. **Express Dissatisfaction:** Once the consumer realizes that the item has a defect, he must express this dissatisfaction to the seller to let him know he would like to nullify the sale. If the consumer recognizes the defect but waits beyond a reasonable amount of time to let the seller know, this lack of action indicates that the buyer is *mochel* - forgives his rights to return the item[3].
3. **Ability to Rectify:** Even in a circumstance that the buyer has the right to return an item, the buyer cannot necessarily cancel the transaction and demand a refund. If the product can be fixed to be like new, the seller must be given the opportunity to fix the item in a reasonable amount of time. Conversely,

if  
the item cannot be fixed to perfection, the seller may not force the buyer to keep the item and refund only the difference between what the buyer paid and what the item is really worth; rather, he must issue a full refund.

#### *Repairable*

Given the above set of conditions, it is important to analyze the details of our case. If the *sheital* can be fixed by adding some hair to the point that the *sheital* would be a perfect product, the buyer is not allowed to demand a refund and cannot just cancel the sale. This being the case, she should wear the *sheital* for the wedding and have it fixed afterwards.

If the *sheital* cannot be fully repaired to perfection, the buyer has the right to cancel the sale. However, this places the woman between a rock and a hard place; if she doesn't wear the *sheital*, she will be embarrassed at the *chasuna*. If she does wear the *sheital*, she forfeits her ability to return the item because she has now used the item and has effected

a מחילה waiving her rights of returning the *sheital* (as above).

#### *Dire Circumstances*

There is, however, an exception to this rule. If the buyer is in a situation of an אונס – a dire condition, even if he is aware of the defect, he may use the item in the dire situation and still have the right to return the object. For example, if one rented a car and midway on his journey he realizes that the air conditioning is broken and he wants to demand compensation for this defect. He may continue using the car and demand compensation at the end of his journey. The same halacha would apply in our scenario. Since the woman is in a dire situation and would be left without a fitting *sheital* for the *chasuna*, she may use the *sheital* and may still demand a refund or a full repair after the *chasuna*.

#### *Not Available*

Another exception is a case where the consumer would like to return the item immediately but the seller is not available. In this scenario, even if the item was used after the defect was noticed, the usage is not considered a מחילה – and the right to return the object still stands[4].

### *Notified in Advance*

There is a dispute in the

Poskim if one can retain the right of return and repair by first notifying the seller of the defect before he uses the item. Some maintain that if advance notice is given to the seller, even if the object was used thereafter, the usage does not indicate a מחילה on behalf of the

buyer, because the buyer expressly communicated his dissatisfaction with the

item. In our scenario, if the woman would notify the *sheital mocher* that she intends to return the item but she needs to wear it for the *chasuna*, she would

still retain the right of return or repair according to some Poskim[5].

ועי' [1]

בשו"ת הגרעק"א (בתרא סי' ק"ו) דהא שנתבטל המקח היכא

דיש בו מוס, היינו משום דכל

מקח הוי מכירה על תנאי שהמוכר יתן לו מקח שלם. ובמקרה שקיבל המקח עם מוס, יש

זכות ללוקח לטעון מקח

טעות, ואז יש זכות

למוכר להשלים התנאי ואינו משלימו,

המקח

בטל. והיינו, דבעצם המקח קיים אלא שאם

טוען הלוקח מקח טעות,

אז

נתבטל המקח. אולם, עי' בשו"ת בית הלוי (ח"ג סי' ג') דפירוש אחר יש בדבר, דביטול

מקח אינו מדיני

תנאי אלא היכא דאיכא מוס המקח בטל מפני שיש חסרון בעיקר המקח, והוי כאילו

הלוקח קיבל

מקח אחרת לגמרי ממה ששילם עליה

'שו"ע חושן משפט סי' רל"ב סע' ג. [2]

מדברי הרמב"ם (הובא במקור המשפט) משמע דעד שמשמש במקח לא חשיב [3]

מחילה. אבל הרדב"ז (סי' קל"ו § ח"ד סי' אלף ר"ו) מביא בשם רב האי גאון דהיכא דהוי

הדין עם שמעון צריך לישבע שמעון שלא הרגיש במום זה עד עתה, עכ"ל. ודייק המחנה

אפרים (הל' אונאה סע' ד') דמיד כשמרגיש הלוקח במום שצריך להחזירו, ואם אינו

מחזירו מיד נחשב ההמתנה למחילה ושוב אינו יכול לטעון מקח טעות. וכן משמע ברי"ף

בב"מ (דף נ) שכתב וז"ל והיכא דזבין איניש מידי ולאחר זמן איגלי ליה דאית ביה מומא

דהוה ביה מעיקרא מקמי דלזבניה, אית ליה לאהדורי למריה ולא אמרינן בכי הא, הא

שהה ליה בכדי שיראה לתגר או לקרובו, דלא אמור רבנן הכי אלא גבי אונאה. אבל גבי

מומין מקח טעות הוא, וכל אימת דמיגלי ליה מהדר ליה למריה, והכי כתב רבינו האי גאון

זצ"ל, עכ"ל. ומלשון "וכל אימת דמיגלי ליה וכו'" משמע דצריך להחזירו מיד, דאם לא

עשה כן נחשב מחילה

כן פסק הנהניבות (משה"א [4]

סק"א) והובא להלכה בפתחי תשובה שם סק"א

המחנה אפרים פסק דלא חשיב מחילה, והגליא מסכת הוכיח דחשיב מחילה (והובא). [5]

בפתחי תשובה שם