

Who Is At Fault For a Default?

## **Reneging**

### **on an Agreement Part I**

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There are two categories of agreements which can affect when an agreement is broken. In *Bava Metzia*, 49A, the Gemara discusses two different types of contractual agreements and the ramifications of nullifying each one.

#### ***Kinyon Kesef: When Goods Have Changed Hands***

This Mishna refers to *kesef* which is not *koneh m'taltalin*. The Gemara *paskens* like Rav Yochanan who holds that *M'doraisa*, *kesef* is *koneh*, but *Chazal* were *mevatel kinyon kesef*. Therefore, the *kinyon* is not

complete until *meshicha* was

performed. Once the item is taken into the *reshus* of the *lokeach*, then the *kinyon* is valid. Before the *meshicha* is complete, either party can be *mevatel* the *kinyan*.

However, the Mishna does make a qualification if someone breaks an agreement where *kesef* was paid or a down payment was made on moveable *m'taltalim* that are

being sold. If someone breaks this kind of agreement, the Mishna says he receives

a *mi shepara*. The *mi shepara* is a *klala*, a curse, of "*Mi Shepara m'anshei mabul v'anshei dor*

*hafloga hu yifrah mizeh shechozar b'diburo*"

- "He who took retribution from the people of the Mabul and the people of the Dor Haflga, He should take retribution from one who goes back on his word".

#### **A Verbal**

#### **Agreement**

A person who breaks a verbal agreement has a different level of *tayna* against him.

The above Gemara refers to this as "*michusur amana*." In this case, a *mocher* and a *lokeach* have agreed on the sale of a certain item. They made up a price and the deal was finalized, though no goods or money have changed hands. If one

party breaks this contractual agreement, there is no *mi shepara*, since no actual *kinyan* occurred.

However, there is a degree of *tayna* against him, and he is considered to be *m'chusar amana*, he is

from those lacking in faith or as we would call it today, lacking in good faith. Two people had a verbal agreement, and one went back on his word, so he

is lacking in good faith in honoring his word.

#### **What Level of Tayna?**

There is a fundamental difference between one who breaks a deal with a *kinyon*, and one who breaks a verbal agreement.

When a *kinyon* is broken,

*Chazal* say this

is a "*mi shepora*." This is

not the simple understanding that *Chazal* were *mevatel* the *kinyon*, rather the *kinyon* was broken and *Chazal* have a strong *tayna* against this.

But someone who was *m'chusar*

*amana* did not break a contract, since there was no *kinyon*. The only thing he broke was

his word. The *tayna* against

him is that he is lacking in good faith, he is missing the *darga* of being a *baalei emunah*, where

his word is trustworthy. When a person gives his word, it should be *kodesh kodoshim*. There are many *parshios* in the Torah that point to the *kidushas hadibbur* of a

person. The person who goes back on his word is considered to be *m'chusar amana*.

**Exceptions to *M'chusar amana*:**

**Changing**

**Circumstances**

At the end of *siman* 204 in *Choshen Mishpot*, the *poskim* discuss the halacha of *m'chusar amana*. There is a *machlokes* among the *Rishonim* if a person who breaks a verbal agreement to buy or sell an item is always considered *m'chusar amana*.

There may be mitigating circumstances, with an instance of *trei tarii*. *Trei tarii* literally means that there are two markets or two prices, two *sheorim* to this item.

For example, if Reuven and Shimon make an agreement where Reuven would

supply Shimon with 100 sacks of flour, at the price of \$2.00 a pound.

Overnight, there was a flour shortage on the market, and the price of wheat went up to \$3.50 a pound, before the *kinyon* was performed. This is considered *trei tarii*, and if

Reuven would break his verbal agreement with Shimon at this point, there is no *tayna* against him.

The *Shach* says that

we *pasken* like the *Rema*, that in the case of *trei tarii*, there is no *tayna* against a

person who breaks a verbal agreement, and he is not *m'chusar amana*. No *kinyon* was performed, and he did

not break his word because of lack of good faith. Rather, he broke his word because the conditions of the agreement changed, there was a different set of circumstances for

the deal.

### **Unforeseeable Circumstances**

The *T'shuvas*

*Chasam Sofer, Choshen Mishpat, Siman 102* concurs. If there is a change in circumstances that alters the *metzios* of the deal, and a person goes back on a verbal

agreement to buy or sell an item, there is no *tayna* of *m'chusar amana*.

For example, Levi is offered a job in the suburbs and he decides to sell his house in the city. Levi made a verbal agreement to purchase a house in

the suburbs, and to sell his house in the city.

Then, the company unexpectedly goes bankrupt and Levi's job offer is canceled. Now he has to go back on the verbal agreement to sell his house.

Levi is going back on his word because the situation itself has changed, not because his word has no value. [This would also be the case if Levi had a sudden change of financial status.]

The *Piskei Chosen* points

out that we cannot always use the rule of unforeseeable circumstances to remove

the *tayna* of *m'chusar amana*.

For example, if someone makes a verbal agreement to buy a car for a certain price. The next day, he gets an

offer to buy a car at a better price. If he were to break his verbal contract with the first person, he is considered a *m'chusar amana*.

In this case, the circumstances have not changed. When conducting business,

it is understood that you could always get a better offer. But once you make a

verbal agreement, even before the *kinyon*, you made a commitment. The fact that a second

person offered a better priced car is not considered to be a different set of circumstances which would remove the *tayna* of *m'chusar amana*.

### **No Exceptions for *Mi Shepara***

However the halacha of *mi shepara* does not leave any room for loopholes or

exceptions. *Mi shepara* applies

to a person who breaks a completed *kinyon*, reneging on an existing contract.

This is a more serious *avla*, and it

carries the weight of the *klala*,

*a mi shepara* from *Chazal*. It makes

no difference if the price of the item went up or down, or if his financial or personal circumstances changed.