

Onaah and Mekach Ta'os Part V

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RESPONSIBILITIES AFTER A MEKACH TA'OS:

As we explained in an earlier segment, when a buyer receives defective goods, the sale is null and void and considered as if it never happened.

This leads us to a discussion regarding what should be done at this point. If the buyer has already paid and the goods have been delivered, the money is now in the pocket of the seller and the merchandise is in the home of the buyer. What should they do now?

Regarding the money it is relatively simple, as it is obvious that it belongs to the buyer and has to be returned. Regarding the merchandise it is a bit more complicated. What should the buyer do with the goods? Is he responsible to pay to ship them back to the seller? Is he obligated to watch and protect the item as long as they are on his property?

THE BUYER'S RESPONSIBILITY AS A MAZIK OR GUARDIAN

The Nesivos Hamishpat dwells on this topic and explains that a number of other halachos come into play in regard to the unwanted merchandise. Although the sale is not valid when the buyer rejects the merchandise due to its defect, he still is not permitted to damage it, lest he be liable as a *mazik*, and he still may have to watch over it while it is on his property, with the status of a *shomer*.

If the buyer mistreats the item, the Nesivos says that he will be deemed a *mazik* and he will be liable, meaning that he will not be refunded the money he paid the seller. For example, if he buys a car and after driving it, is disappointed and upset to discover that the engine is of inferior quality. If he then takes out his frustration by bashing up the car, he becomes a *mazik* and has forfeited his right to demand all of his money back.

On the other hand, the Mishnah in Bava Basra discusses a case where someone buys seeds to plant in the ground. After he

plants the seeds, he discovers that nothing grew from them because they were inferior seeds, which were meant for eating rather than planting. This is a case of *mekach ta'os* where the buyer can nullify the sale and demand his money back. In such a case, the buyer did "damage" the seeds by placing them in the ground, where they rotted into nothingness; however, he cannot be considered a *mazik* because he did nothing wrong by using the seeds as intended at the time of purchase. Thus, he could still demand a full refund.

If the merchandise is sitting on the buyer's property and he wants to return it, and he has not damaged it in any way, the Nesivos says that he still has to watch over it as a *shomer*. He has to take care of it responsibly and notify the seller to come pick it up, and protect it until it is taken away.

THE SELLER'S RESPONSIBILITY AS A Garmi

In some cases, the buyer may have suffered a financial loss as a result of the sale. For example, if he bought an air conditioning unit, he may have hired workers to install it, only to discover it is of inferior quality and does not work well. In such a case, the Shulchan Aruch, as explained by the Nesivos, rules that if the seller was unaware that the merchandise was defective, he is not liable for the expenses of the buyer. However, if he was aware of the deficiency and still tried to pass on the air conditioner to the buyer, he would be obligated to compensate him for his loss, as he is the *mazik* in this case. He caused the buyer an indirect loss which falls under the category of *garmi*, for which a *mazik* is liable.

If the seller was unaware of these potential expenses, the halacha would be different. The Shulchan Aruch rules that in such a case the seller only is liable for the expenses he knew about, but not for those he did not envision. For example, if he sells a washing machine, he can assume that it will be taken to a nearby home; therefore, he will be liable to pay for the shipping. If the buyer took it upstate to his summer home without informing the seller of his plans, the seller would not be obligated to pay for the shipping since he did not know

about this plan. This would mean that had the buyer informed the seller at the time of the same that he was planning on shipping the washer upstate, the seller would be liable to pay for the shipping.

The explanation of this ruling is that when the seller knew the buyer's plans, he can be considered a *mazik* for selling him inferior goods and allowing this expense to be racked up, and he has to reimburse him for the damage he caused. If he did not know the buyer's plans, he cannot be considered a *mazik*; rather, he only allowed the buyer to damage himself by moving the item to a remote location, and he is not liable for the damage the buyer accrues.

WHO PAYS FOR THE RETURN SHIPPING?

In regards to the return shipping costs, we have a similar Halacha. Usually, the seller is responsible for the costs of returning the items. Even if the buyer took the items far away, if the seller knew [or should have suspected] that the buyer was taking the washing machine upstate, he would be responsible to pay the costs to have the machine returned to him. If he did not know about those plans, he would not have to pay the return shipping fees. In fact, in such a case, he would not have to pay the return shipping fees even if he was aware of the deficiency when he sold the merchandise.

One may ask why the buyer would ever have to pay to ship the merchandise back to the seller. If there was no sale, and the entire deal is moot, it would seem that the buyer should have no responsibility for the item that is currently sitting in his home. Why should he have to pay to return it in the instance where the seller didn't know about his plans?

According to the Nesivos, the answer is that taking the item to an unexpected location also falls under the purview of *hezek*. Mislocating an item by removing it from its place could also be considered damage. If the buyer does this, he has to pay for the damage he caused, i.e., the shipping costs to have it returned.

THE DISSENTING VIEW:

Numerous Acharonim – including the Even Ha'azel and Imrei Binah – disagree with the opinion of the Nesivos and understand the buyer's obligations differently. They explain that a sale where the buyer has a claim of *mekach ta'os* due to the inferior quality of the merchandise is not automatically nullified on its own; rather, the buyer must take the appropriate action to nullify the deal.

According to their understanding, when a buyer has such a claim, he has the right to claim *mekach ta'os*, but he must follow a specific procedure to nullify the deal. If he doesn't do so, it is considered as if he agreed to make peace with the deal and the sale remains valid.

The process he must follow to invalidate the entire deal

is to send the goods back to the seller. Because the buyer must send the merchandise back in order to nullify the sale, if it was ruined before he sent it back or he refuses to pay the shipping costs, he would not be able to get his money back, as the terms of *mekach ta'os* were not fulfilled. Thus, his obligations have nothing to do with the tangential laws of *mazik* or *shomer*; rather, they are all part and parcel of the rules of *mekach ta'os*.

It must be noted that when these Acharonim offer this explanation, they are only speaking of a case where the buyer received the same item he ordered, but it was of inferior quality. In order to nullify such a deal, he would have to send the item back undamaged; however, if he received a totally different item – for example, if he ordered apples and received oranges – even these Acharonim would agree that the sale is automatically null and void and the buyer would not need to take any action for it to be declared a *mekach ta'os*.

IF THE BUYER ALLOWED THE ITEM TO GET RUINED

This leads us to a practical difference between the view of the Nesivos and the view of the other Acharonim: A store delivers an item to a buyer, who takes a look at it, sees it is not what was agreed upon, and decides to make a claim of *mekach ta'os*. Rather than shlep the item inside, he leaves it outside on his back porch. Being that the item was left out in the elements, it became damaged. Is the buyer responsible for the damage?

If we are speaking about the type of *mekach ta'os* where the item delivered is the same item that was expected, albeit of inferior quality, both the Nesivos and the other Acharonim would agree that he is liable. According to the Nesivos, he is liable because his negligence deems him a *mazik*. According to the other Acharonim he is liable because he never fulfilled the terms of *mekach ta'os*. Since he did not return the item properly, he can no longer make a claim of *mekach ta'os*.

On the other hand, if we are speaking of the apples and oranges type of *mekach ta'os*, where the buyer ordered one item and received a totally different thing, the buyer would only be liable according to the Nesivos, and not according to the other Acharonim. According to the Nesivos, he would be liable to pay because he is a *mazik*. According to the other Acharonim, however, he would not be liable to pay as in such a case they hold that the sale is automatically nullified and the buyer has no obligation to care for the item that does not belong to him.