

Onaah and Mekach Ta'os Part III

Rav Yosef Greenwald

WHEN A SALE IS NOT A SALE:

A discussion of the laws of *mekach ta'os* has to begin with an explanation of what *mekach ta'os* is and what it is not. In our series on the laws of *onaah*, we explained that there are numerous limitations on how and when the laws of *ona'ah* can be enforced. This is because a sale in which one side is taken advantage of and given a bad price is still an actual sale, as the goods were delivered and the agreed upon sum was paid; however, the Torah still protects the side which was taken advantage of and allows them to either recoup the amount they were overcharged or annul the sale, depending on the exact circumstances. Because the sale is valid, there are limitations regarding how inflated the price has to be to enforce the laws of *onaah* and regarding how long the aggrieved party has to make a claim.

Regarding *mekach ta'os*, when a buyer does not receive the item he paid for, there is no statute of limitations. This is because when a sale is a true *mekach ta'os* it is nullified as if it never occurred. Since the buyer did not get what he bought, there was no sale at all, and there can be no limits on how long the buyer has to make a claim or how he must make this claim.

THE TWO TYPES OF MEKACH TA'OS:

From a Mishnah in Bava Basra, we learn that there are two types of *mekach ta'os*. The first type would be when one orders a certain item, but receives a completely different item. For example, someone orders apples from a grocery store, but they deliver oranges instead. This type of *mekach ta'os* is pretty straightforward. The buyer clearly never bought oranges, so the sale is completely invalid.

The second type of *mekach ta'os* would be when the item delivered is the same item that was ordered, but it is of inferior quality. An example would be if someone made up to purchase a Toyota Camry, and received a Toyota Camry albeit with an engine of lower quality than it should have been. This is a more subtle case of *mekach ta'os*, and the laws are a bit more

complicated.

For this second type of *mekach ta'os*, we would have to determine what can be expected in a sale and when the buyer has a good claim that what he received is of inferior quality to what he was expecting. This determination is sometimes dictated by simple common sense, sometimes by societal norms and sometimes by halachic factors. Oftentimes, the best indicator is the agreed upon price, which can serve as a testimony to what quality of merchandise would normally be sold for that amount.

HALACHIC DIFFERENCES BETWEEN THE TWO LEVELS OF MEKACH TA'OS:

As we explained, in a case where one ordered apples and received oranges, the sale is automatically null and void as if it never occurred. For this reason, the buyer cannot decide that he is okay with what he received and choose on his own to allow the deal to transpire. If the grocery store would decide that they want the oranges back, they would have every right to take them – and, of course, return the money. Since the sale never took place, the oranges never left the ownership of the store, and they certainly can take back the oranges.

Furthermore, the buyer bears no responsibility for the oranges that were delivered to his house, [though he may be considered a *shomer aveida*,] and it is up to the store to come get them.

In a case of the more subtle type of *mekach ta'os*, where one ordered an item and received that item but of lesser quality than expected, the facts are more subjective and it is possible for the deal to stand. It is up to the buyer to decide if he wishes to pursue a claim, or if he is willing to make peace with the situation and accept the merchandise with its flaws.

If the buyer would know about the flaws but still use the item, that would be taken as a sign that he made peace with the sale, and he would lose his right to nullify the deal. For example, if he would receive a car of lesser quality than what he expected and would drive around in it for a week before deciding he wants to claim *mekach ta'os*, he would no longer be able to

make such a claim.

The Gemara discerns the fact that the buyer can choose to accept the item of inferior quality and to have the sale stand from a case of a marriage. It is stated that if a man marries a woman, and later discovers that she possesses flaws that make her inferior to what he was expecting, he may have a right to claim *mekach ta'os*. But if he chooses to stay with her regardless of her imperfections, the marriage stands and a new kiddushin is not required. The Gemara says that the same concept applies to a sale. If the buyer decides to keep the item of inferior quality that he received, the original deal stands.

RECOURSE IN THE EVENT OF MEKACH TA'OS

It is important to note that when the item is of inferior quality, the buyer only has two options: He can either claim *mekach*

ta'os and nullify the sale, or he can make peace with what he received and accept the deal. He cannot hold on to the goods and demand that the price be lowered to reflect the inferior quality. To illustrate, if he paid \$20 for a pillow cover and received one that is frayed and, in his opinion, only worth \$15, he cannot decide to keep the pillow cover but demand a \$5 refund. (Of course, if he chooses to nullify the deal, he can then start over and try to negotiate a new sale with the seller for a lower price.)

If the buyer used the inferior product before noticing the flaws, it is possible that he would still be allowed to back out of the sale. This would depend on a variety of factors that would determine whether he should have checked the item for this type of flaw in quality before using it. Every case would be different in this regard, and would largely depend on what is considered something that is normally checked for or should have been noticed before an item is used.