

Ribbis Fundamentals: Part III

CONDITIONAL RIBBIS

Rav Yosef Dovid Josilowsky

THE CASE:

The following question was presented to the Bais HaVaad: Reuven asked his friend Shimon for a loan of \$250,000. Shimon agreed but said that he needed some collateral. Reuven told Shimon that he had a \$400,000 stake in a real estate deal that he would put up as collateral, and if he doesn't pay back the loan on time, Shimon could take that in the money's stead. Shimon also preferred to structure this transaction as an absolute sale of the real estate now at the time of the "loan" with an option for Reuven to buy it back if he comes up with the money on the "due date."

Is this permitted or is it considered a prohibition of *ribbis*?

RIBBIS IN THE FORM OF A PENALTY:

To answer this question, we will need a bit of background. There is a concept found in the Mishnah (BM 65b) known as *ribbis derech knas*, *ribbis* in the form of a penalty. The Mishnah speaks about a case where a lender gives a borrower a loan, with the borrower putting up his field as collateral. They make up that if the loan is not repaid within three months, the lender will take possession of the field in lieu of payment. The Mishnah and Gemara conclude that this is permitted, even if the field is worth more than the amount of the loan, and, again, there is no problem of *ribbis*. According to many Rishonim, the reason this is not *ribbis* is because the extra payment is not made in the form of interest – which is defined as paying money for an extension of time to repay a debt; rather, it is put into the deal as a penalty for non-payment. Since it is a penalty, rather than interest, it is not forbidden as *ribbis*.

From this Mishna, it would seem that the answer to our question is that it would be permitted to put up the \$400,000 real estate deal as collateral and for the borrower to take possession of it if the loan is not repaid. We will soon see,

however, that this is not so simple.

THE SHULCHAN ARUCH'S POSITION:

There is a *halacha* in Shulchan Aruch that seems to contradict this Mishna. The Shulchan Aruch (Y.D. 177:17) writes that some say that it is forbidden for a borrower to provide a *mashkon* for a loan that is worth more than the loan itself because this would be "*haramas ribbis*" (an appearance of *ribbis*). He seems to be saying that because the lender will take possession of the *mashkon* if the loan is not repaid, it will appear that he is being paid more than the amount that he lent, which he says is forbidden because it looks like *ribbis*.

The Vilna Gaon and others note that this Shulchan Aruch seems to run contrary to the Mishna quoted above, and therefore, they reject his ruling. Some Poskim even infer from an earlier Rema that he argues with this Shulchan Aruch, allowing *ribbis* in the form of a one-time penalty so long as it is being done in the form of a sale e.g. land for money, and not for a loan.

THE RISHONIM BEHIND THE SHULCHAN ARUCH:

It is important to note that elsewhere the Shulchan Aruch (177:14) cites the opinion of several Rishonim that setting up a penalty if a loan is not repaid on the due date is prohibited because it is *haramas Ribbis*.

[The Mordechai actually relates that the Ri of Orleans drafted a *shtar* to permit accruing *ribbis* by putting it in as a form of penalty, rather than as interest. He wrote the *shtar* to say that if the borrower doesn't pay back by a certain time, he will be charged a penalty of a specific amount for each set time that passes. Other Rishonim disagree, based on this Rashba, and say that if this was the original agreement, it would be forbidden. Some take it a step further and say that this would

be actual *ribbis*, not merely *haramas ribbis*, because the borrower is clearly buying a time extension on his loan by paying the penalty.

Surprisingly, the Minchas Shlomo speaks about a Gemach that had a policy that if a loan is not repaid by its due date, the borrower is charged a penalty. He says that this would be permitted if the loan is set up in such a way that it is still currently due, and the borrower buys no time extension by paying the penalty. Since he is simply paying a fine for being late, and is not gaining any time extension by doing so, he says that this would not be considered *ribbis*. However, it would seem that most Poskim disagree and rule that any accruing late fee would be a problem of *ribbis*.]

How does the Shulchan Aruch explain the Mishna? The truth is, there are some Rishonim that understood the Mishna to be only *b'dieved*, but that doesn't seem to be the consensus. Alternatively, the Rashba, who is one of the sources of this halacha, clearly forbids the practice of accepting *ribbis* in the form of a penalty by taking a collateral that is worth more than the loan and stipulating that non-payment will result in the seizure of the entire collateral, calling this *haramas ribbis*. He gives a rather cryptic response to differentiate between this and the Mishna, by saying that in the case of the Mishna the field is being given as a collateral.

The Chavos Daas settles the contradiction between the Shulchan Aruch and the Mishna differently. He says that there is a difference between a case where real property is used as the collateral and a case where movable items are used for that purpose. He explains that land has no clear value, so it does not necessarily look like an overpayment when one pays his loan with a field, rather than with the money he owes. Movable items, on the other hand, have a clear, defined value. If that value is more than the amount of the loan, paying the loan with them would be forbidden as *ribbis*.

According to this, the case in our question might still be problematic. The lender wants to take a portion of a real estate deal as collateral, which is worth more than the amount of the loan. Although this collateral is land, it may well be that his stake is secured by preferred equities or the like which would keep it's actual value at \$400,000 and would constitute *haramas ribbis* according to the Chavas Daas.

A DIFFERENT UNDERSTANDING OF THE MISHNA:

Other Acharonim explain the Mishna in a different way altogether, which would provide another basis to be lenient. Based on a Tosafos, they note that in the case where the field was put up as collateral, the borrower had another option: he could have sold the field and used that money to repay his loan. Why didn't he do this? Obviously because, for whatever reason, he preferred to just let the lender have his field, rather than giving him money. In essence, what he is doing is selling his field to the lender for the amount he owes him. Therefore,

he is not actually overpaying him, as he is showing that the amount of the debt is the amount that the field is worth to him.

It isn't clear whether the Shulchan Aruch we quoted above would agree with this reasoning. In our case though, it would seem to be permitted to arrange this form of penalty for non-payment, because the borrower could just as well have sold his share and used the money to repay the loan before the due date.

Alternatively, Tosafos there suggests that the Mishna would only be permitted in a case where the field was given over to the lender "*mayachshav*", as a complete sale at the time of the loan. According to this, in our case it would actually be preferable to set it up as a sale "*mayachshav*" with a buyback option. While this option is helpful to circumvent the issue of *haramas ribbis*, it raises another issue that must be addressed.

THE BUY-BACK DILEMMA:

When an item is given to a lender in lieu of payment, but the borrower is given an option to buy it back when he is able to come up with the money, this presents a new issue of *ribbis*. If he does buy back the field after a month, it would turn out that the lender was using the field and eating its fruits for a full month without paying anything for that benefit. This would be an extra payment that would be considered *ribbis*.

The Pischei Teshuva (YD 174:1) offers a solution to this problem. He says that the field should be given with finality, with no buyback option attached to the loan repayment. However, it should also be stated in the agreement that the seller/borrower will have an option to purchase his field back from the lender as a completely new sale. Once the new purchase is disassociated from the loan, he says that it would be permitted.

However, the Ritva frowns upon this solution, describing it as a *haramah*. He says that it is clear that the new sale is actually related to the loan and *ribbis* was given, and the formulation of the agreement is simply an ingenuine attempt to find a loophole. The Chikrei Lev says that because of this Ritva, one should not rely on this solution.

Some Acharonim propose that if the transfer of ownership of the field is made permanent after a specific amount of time – meaning the borrower has a limited amount of time to buy it back – this would be a way to strengthen the Pischei Teshuva's solution. Accordingly, if one draws up the agreement with the terms of the Pischei Teshuva, and adds this time limit stipulation as well, they permit this type of arrangement.

In our case, if the borrower gives the full rights of his portion of the real estate deal to the lender immediately albeit with an agreement that stipulates a re-sale, and puts into the agreement that the "seller/borrower" loses his right to buy it back after a certain time limit, the agreement would appear to be permissible according to most opinions.