

## Conditions that Attempt to Override Torah מתנה על מה שכתוב בתורה - Makkot 3b

What is the logic behind ignoring conditions made in an agreement that attempt to override the Torah? According to Chazal, unless the context is financial, the condition is void, while the agreement stands without it. Why shouldn't such conditions have the teeth to void the whole agreement or transaction? And why are conditions in monetary transactions valid even if they override Torah?

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### 1. בבלי מכות ג:

ואמר רב יהודה אומר שמואל: האומר לחבירו "על מנת שלא תשמיטני שביעית" – שביעית משמטת. לימא קסבר שמואל: מתנה על מה שכתוב בתורה הוא, וכל המתנה על מה שכתוב בתורה – תנאו בטל.

§ And Rav Yehuda says that Shmuel says with regard to abrogation of debts: In the case of one who says to another the stipulation: I am lending you money on the condition that the Sabbatical Year will not abrogate my debt, even if the borrower agrees to that stipulation, the Sabbatical Year abrogates the debt. The Gemara suggests: Let us say that Shmuel holds that the lender who proposed that stipulation is one who stipulates counter to that which is written in the Torah, and in the case of anyone who stipulates counter to that which is written in the Torah, his stipulation is voided.

והא איתמר, האומר לחבירו: "על מנת שאין לך עלי אונאה", רב אומר: יש לו עליו אונאה, ושמואל אומר: אין לו עליו אונאה.

The Gemara asks: But wasn't it stated that there is a dispute between Rav and Shmuel concerning this matter? In the case of one who says to another the stipulation: I am selling you this item on the condition that you have no claim of exploitation against me if I charge you more than the item is worth, Rav says: The buyer has a claim of exploitation against him, as one cannot stipulate to waive the *halakha* of exploitation. And Shmuel says: He has no claim of exploitation against him. Apparently, according to Shmuel, one may stipulate to waive a Torah law in monetary matters, as it is tantamount to waiving his rights to money due him and it is not in effect counter to that which is written in the Torah.

הא איתמר עלה, אמר רב ענן: לדידי מפרשא ליה מיניה דשמואל, "על מנת שאין לך עלי אונאה" – אין לו עליו אונאה. "על מנת שאין בו אונאה" – הרי יש בו אונאה.

The Gemara answers: Wasn't it stated with regard to that *halakha* that Rav Anan said: It was explained to me personally by Shmuel himself that the matter depends on the formulation of the stipulation. If the seller stipulates: On the condition that you have no claim of

exploitation against me, then the buyer has no claim of exploitation against him, as it is as though he is waiving his right to money due him. But if the seller stipulates: On the condition that there is no prohibition of exploitation in this transaction, there is a prohibition of exploitation in that transaction.

הָקָא נָמִי, "עַל מְנַת שְׁלֹא תִשְׁמַטְנִי בְּשִׁבְעִית" – אֵין שְׁבִיעִית מְשַׁמְטָתוֹ. "עַל מְנַת שְׁלֹא תִשְׁמַטְנִי שְׁבִיעִית" – שְׁבִיעִית מְשַׁמְטָתוֹ.

Here too, if the lender stipulated to the borrower: I am lending you money on the condition that you will not abrogate the debt during the Sabbatical Year, the Sabbatical Year does not abrogate his debt, as the borrower is merely waiving money due him. But if he stipulated: On the condition that the Sabbatical Year will not abrogate my debt, the Sabbatical Year abrogates the debt, as that is a stipulation to nullify the *halakha* of the Sabbatical Year concerning that loan, and one may not stipulate counter to that which is written in the Torah.

## 2. ריטב"א מכות ג:

לכך הנכון דכי אמר ע"מ שאין לך עלי אונאה תנאו קיים לפי שהתנאי הוא ביניהם וכאלו מוחל לוקח הונאתו אבל כשהתנה ע"מ שאין בו אונאה התנה שאין במקוזה דין אונאה כלומר שלא תחול עליו והוא מתנה על מה שא"א דע"כ תחול בו דין אונאה

Therefore it is accurate to say that when the person stated "on condition that you don't have ona'ah against me" their condition is upheld because it is a condition made between the two of them, and it is as though the buyer is simply waiving their right to contest the extra fee. But when one stipulated, "on condition that there is no ona'ah here," the person has stipulated that the rule of ona'ah does not apply, and the person is stipulating something that is impossible, for by default the rule of ona'ah applies.

## 3. רמב"ם מכות ג:

האומר לחבירו על מנת שאין לך עלי אונאה יש לו עלי הונאה. במה דברים אמורים בסתם שאין יודע כמה הונאה יש בו כדי שימחל. ואין צריך לומר אם אמר לו על מנת שאין בו הונאה שיהי יש בו. אבל במקרה אין לו הונאה שכל תנאי שבממון קיים:

Although a person tells a colleague, "We are completing this transaction on the condition that you do not hold me responsible for the unfair gain," the laws of *ona'ah* apply.

When does the above apply? When the statements are made without being explicit. In such an instance, the other party does not know how much money he is forgoing in favor of his colleague. Needless to say, this is the law when one tells the other: "We are completing this transaction on the condition that there is no *ona'ah* involved," for *ona'ah* is involved.

If, however, one explicitly mentions the amount of unfair gain, the laws of *ona'ah* do not apply, because all conditions that are accepted by both parties are binding in cases of financial law.

#### 4. תוספתא קידושין ג:ז

על מנת שאם מתי לא תהא זקוקה ליבם, הרי זו מקודשת, ובטל תנאו, שהתנה על מה שכת' בתורה, וכל המתנה על מה שכת' בתורה תנאו בטל. על מנת שאין לך עלי שאר כסות ועונה, הרי זו מקודשת, ותנאו בטל. זה הכלל, כל המתנה על מה שכת' בתורה בדבר של ממון, תנאו קיים, בדבר שאינו של ממון, תנאו בטל. "[Be betrothed to me] with the understanding that if I die you will not bound to a levir"—she is betrothed but his stipulation is void, for he stipulated against what was written in the Torah, and anyone who stipulates against what is written in the Torah, their stipulation is void. "With the understanding that I will have no responsibility for you for food, clothing or conjugal rights"—she is betrothed but his stipulation is void. This is the rule: Anyone who stipulates against what is written in the Torah regarding a monetary matter—their stipulation stands; with a non-monetary matter—their stipulation is void

### An Exception

#### 5. משנה בבא בתרא ח:ה

האומר איש פלוני בְּנִי בְּכוֹר לֹא יִטַּל פִּי שְׁנִים, אִישׁ פְּלוֹנִי בְּנִי לֹא יִירֶשׁ עִם אָחִיו, לֹא אָמַר כְּלוּם, שֶׁהִתְנָה עַל מָה שֶׁכָּתוּב בַּתּוֹרָה.

One who says: so and so, my firstborn son may not take a double portion; so and so, my son may not inherit with his brothers, has said nothing, for he has made a condition against something written in the Torah.

#### 6. בבלי בבא בתרא קכו:

אָפִילוּ תִּימָא רַבִּי יְהוּדָה: הָתָם יָדְעָה וְקָא מְחִלָּה, הֵכָא לֹא קָא מְחִיל.

The Gemara rejects this suggestion: Even if you say that the mishna is in accordance with the opinion of Rabbi Yehuda, there, the woman knew of his stipulation and waived her rights. Therefore, the stipulation stands. Here, the son whose portion was reduced did not waive his portion. Therefore the stipulation is not valid.

#### 7. רמב"ם משנה תורה הל' נחלות ו:א

אִין אָדָם יָכוֹל לְהוֹרִישׁ לְמִי שֶׁאִינוּ רְאוּי לִירְשׁוֹ וְלֹא לַעֲקֹר הַיִּרְשָׁה מִן הַיִּרְשָׁה אֶף עַל פִּי שְׁנָה מִמּוֹן הוּא. לְפִי שֶׁנֶּאֱמַר בְּפָרֶשֶׁת נְחָלוֹת (במדבר כז יא) "וְהִיְתָה לְבְנֵי יִשְׂרָאֵל לְחֶקֶת מִשְׁפָּט" לוֹמַר שֶׁחֶקֶת זֶה לֹא נִשְׁתַּנָּה וְאִין הִתְנַאי מוֹעִיל בָּהּ. בֵּין שְׁנָה וְהוּא פְּרִיא בֵּין שְׁהִיָּה שְׂכִיב מֵרַע בֵּין עַל פֶּה בֵּין בְּכָתֵב אִינוּ מוֹעִיל:

Although all that is involved is money, a person may not give property as an inheritance to a person who is not fit to inherit, nor may he exclude a rightful heir from inheriting. This is derived from the verse in the passage concerning inheritance, Numbers 27:11: "And it shall be for the children of Israel as a statute of judgment."

This verse implies that this statute will never change, and no stipulation can be made with regard to it. Whether a person made statements while he was healthy or on his deathbed, whether orally or in writing, they are of no consequence.

## Why are anti-Torah Stipulations Void?

### 8. משנה קידושין ג:ד

רבי מאיר אומר, כל תנאי שאינו כתנאי בני גד ובני ראובן, אינו תנאי, שנאמר (במדבר לב), ויאמר משה אליהם אם יעברו בני גד ובני ראובן, וכתוב, ואם לא יעברו חלוצים...

Rabbi Meir says: Any condition that is not doubled, i.e., which does not specify both the result of fulfilling the condition and the result of the condition remaining unfulfilled, like the condition Moses stipulated with the children of Gad and the children of Reuben who sought to settle on the eastern side of the Jordan, is not a valid condition and is not taken into account at all. As it is stated: "And Moses said to them, if the children of Gad and the children of Reuben pass over the Jordan with you, every man armed for battle before the Lord, and the land shall be subdued before you, then you shall give them the land of Gilead for a possession" (Numbers 32:29). And it is written afterward: "But if they will not pass over armed with you, they shall receive a possession among you in the land of Canaan" (Numbers 32:30)...

### 9. כתובות נו.

דתנאי: האומר לאשה "הרי את מקודשת לי על מנת שאין לך עלי שאר כסות ועונה" הרי זו מקודשת, ותנאו בטל, דברי רבי מאיר. רבי יהודה אומר: בדבר שבקמחון — תנאו קיים!

This is as it is taught in the *Tosefta* (*Kiddushin* 3:7): In the case of one who says to a woman: You are hereby betrothed to me on the condition that you have no ability to claim from me food, clothing, or conjugal rights, she is betrothed and his stipulation is void; this is the statement of Rabbi Meir. Rabbi Yehuda says: With regard to monetary matters, such as food and clothing, his stipulation stands; therefore, if she verbally waives part of the marriage contract, and thereby makes a stipulation about a monetary matter, it should be effective.

### 10. תוספות כתובות נו. ד"ה הרי

והשתא דילפינן מהתם דמהני תנאי לבטל המעשה אמרינן דדוקא כשאינו מתנה על מה שכתוב בתורה דומיא דבני גד ובני ראובן שלא התנו על מה שכתוב בתורה

Now that we learned that a condition can undo an act from the condition of the children of Gad and Reuben, we say that it is specifically where one does not make a condition that goes against what is written in the Torah. This is similar to the children of Gad and Reuben who did not make a condition against something written in the Torah.

### 11. תוספות ישנים כתובות נו.

ואומר רבינו תם דהוי מפליג בדברים, ואין זה תנאי כלל

Rabbeinu Tam says: This person is just exaggerating and this is not a condition at all.

## 12. חידושי הרמב"ן בבא בתרא קכו: ד"ה הרי

וניחא ליה לרבינו תם ז"ל דכל מתנה על מה שכתוב בתורה הרי הוא כמפליג בדברים דומיא דתנאי שאי אפשר לקיימו בסופו דבטל ואף על פי שכפל תנאו משום שאינו אלא כמפליג הכא נמי תנאו בטל דלאו כל' הוא ולהפליג בדברים קאמר ליה.

And it makes sense according to Rabbeinu Tam, quoth: Anyone who stipulates a condition against the Torah is as one who is exaggerating, similar to a condition that one cannot uphold, which is also null. And in that case, even if the person doubled their condition language (e.g., "if yes, X; if no, not X"), it does not work because they are simply exaggerating. Likewise, in this case the condition is null because it is nothing, and he is just trying to exaggerate words to her.

## 13. הרשב"א בשטמ"ק כתובות נו.

והיינו נמי דבממון דוקא תנאו קיים מפני שניתן למחילה אבל דבר שאינו של ממון כגון צערא דגופא דהיינו עונה לא ניתן למחילה ולא התנה עמה אלא להפליג בדברים וכ"ש כשהתנה עמה בדבר שאינו בידה למחול כגון ע"מ שלא תהא זקוקה ליבם שזו מקודשת ותנאי בטל וכו'.

And only regarding monetary matters is their condition valid because it can be waived (by the other party). But something unrelated to money, like the pain of a body, i.e., conjugal rights, cannot be waived. And he only made that condition to exaggerate with her. And how much more so is the condition invalid when it is something that she does not have the right to waive, e.g., "on condition that you will not be connected for marriage to your brother-in-law (should your husband die without any children)" that this woman is betrothed, and the condition is void.

## 14. חידושי הרמב"ן שם (המשך)

ולי נראה טעמ' דכל מתנה על מה שכתוב בתורה דתנאו בטל משום דכל תנאי דקא עקר ליה למעשה לאו תנאה הוא שכיון שאמר על מנת שאין לך עלי הרי את מקודשת לי חלו הקדושין שמצאו מקום לחול שהרי אפשר להתקיים התנאי שלא יתן לה שאר כסות ועונה וכיון שחלו לא חלו לחצאין שאין איש' לחצאין

And I think that the reason why one who makes a condition against the Torah, the condition is void, is because a condition that uproots the action itself is not a condition; for once he said: on condition that you do not obligate me in X, Y or Z, you are betrothed to me, the betrothal has already been enacted. For they found a way to be achieved, for it is possible to uphold this condition that he will not give her food, clothing or sexual gratification. And once the betrothal has been enacted, they are not enacted half-way, for there is not such thing as half-way marriage.

## Another Exception:

## 15. משנה מנחות יג:

הריני נזיר, יגלח במקדש. ואם יגלח בבית חוץ, לא יצא. שאגלח בבית חוץ, יגלח במקדש. ואם יגלח בבית חוץ, יצא. רבי שמעון אומר, אין זה נזיר.

Behold I am a nazir - one should shave (at the end) in the Temple. And if one shaved at the Temple of Onias, one has not fulfilled their purification duties. "[I am a nazir] that I shall shave (at the end) in the Temple of Onias," one should still shave in the Temple. But if one shaved at the Temple of Onias, one has fulfilled their purification duties. R. Shimon says: This is not a nazir.

**16. תוספות כתובות נו. ד"ה הרי**

ואר"י דלא אמרינן מתנה על מה שכתוב בתורה תנאו בטל אלא היכא שמתכוין לעקור מה שכתוב בתורה אבל התם סבור הוא שיש מצוה בבית חוניו כמו בבית המקדש ואין מתכוין לעקור אית לן למילף מתנאי דבני גד ובני ראובן

And Rabbeinu Yitzchak says: We only say that the condition against the Torah is void if the person is actually trying to undermine the Torah, but in that case (of the nazir), that person actually thinks that the mitzvah can be done just as well in the Temple of Onias as in the true Temple, and has not interest in undermining the Torah. In that case, we actually do learn from the condition of the children of Gad and Reuven, and the stipulation is valid.