לא החזירו לא יצא –

He did not return it; he did not fulfill his obligation

Overview

רבא taught that if one gives an אתרוג to his friend (to enable him to be מקיים מצות ד' מינים) with the stipulation that it will be returned to the original owner; then if it was returned, the receiver fulfilled his obligation of observing the מצות ד' מינים, however if he did not return it he did not fulfill his obligation.[1]

The גמרא[2] teaches us that the rules governing stipulations are derived from the stipulation that משה made with the בני גד ובני ראובן. Among the requirements are that the תנאי be repeated both in the positive and the negative[3] and that the intended act and the stipulation be separate from each other[4]. If these conditions are lacking then the stipulation is nullified and the agreement stands (notwithstanding that the stipulation was not met).

תוספות asks:

ואם תאמר אמאי לא יצא הא לא הוה תנאי כפול[5] **–**

And if you will say; why is he not יוצא the מצוה of ד' מינים, **since it was not a dual stipulation?!**

תוספות answers:

ויש לומר דאיכא תנאי דלא בעי כפול[6] **–**

And one can say; that there is a stipulation that needs not to be dual -

כגון הכא שהיה דעתו שיברך חבירו על אתרוג שלו –

For instance here where the giver's **intent was that his friend should**

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[1] It was given with the stipulation that it be returned; hence since it was not returned it was never given (as a gift), therefore the receiver never owned it, and therefore cannot fulfill his obligation of the ד' מינים with stolen items.

[2] See גיטין ע"ה,א and קידושין סא,א.

[3] This is called תנאי כפול. The stipulator must state; if the condition is met then the deal becomes effective and if the condition is not met then the deal is void.

[4] If one action is done then another (different) action will become effective this is known as תנאי בדבר אחד ומעשה בדבר אחר.

[5] See 'Overview'. If there was no תנאי כפול then the תנאי (of returning the אתרוג) is nullified, and the מעשה (of gifting the אתרוג) is valid. The gift remains regardless that the conditions were not met.

[6] תוספות answers that the reason that it is necessary to have a תנאי כפול, is because we are not certain whether his stipulation was actually meant to limit the agreement, or because he just wanted to achieve the results of the stipulation; however he is willing to go through with the agreement regardless. Therefore it is necessary for him to clarify the negative; if the stipulation is not met, the agreement is voided. However when we are certain that he does not want the agreement unless the stipulation is carried out (as in the case of אתרוג, etc.) then there is no need for a תנאי כפול.

make a blessing on the giver's **אתרוג.** The giver never intended to give it away to the recipient as a gift.

וגדולה מזאת אמרו[7] (לקמן דף מט,ב ושם) **בההוא גברא דזבין נכסיה –**

And the גמרא **teaches an even greater novelty than this, in** the case concerning **this person who sold his property -**

אדעתא למיסק לארעא דישראל ולא פירש ולא מידי–

With the intent to go up **to ארץ ישראל; however he was not explicit at all** (he did not mention that he is selling his properties because he intends to move to א"י) -

וסוף לא סליק בעי למיהדר ואמר רב הונא הוי דברים שבלב ואינם דברים –

And the end was that he did not go up to א"י. **He wanted to retract** the sale and return the monies received and reacquire his properties, **so רב הונא ruled** that his intent **is** merely **words of the heart and are not** considered **words.** His intent was never articulated and is therefore meaningless. He cannot rescind the sale. This concludes the citation of that גמרא.

תוספות continues to prove his contention that a תנאי כפול is not always necessary:

אם כן משמע דוקא משום דלא פירש אבל אם פירש הוי תנאי אף על גב דלא כפליה[8] **–**

It therefore seems that it is only because he was not explicit concerning his intention to travel to א"י, that he cannot retract the sale; **however had he expressed** his intention **it would have been a** valid **stipulation even though he did not repeat** the stipulation**.** It is evident that certain stipulations do not require a תנאי כפול.

תוספות offers another case where a תנאי כפול is not required.

והכי נמי איתא במי שמת (בבא בתרא דף קמז,א) **גבי שכיב מרע**[9] **שאמר –**

And a similar situation is mentioned in פרק **מי שמת concerning a שכיב מרע who said -**

כמדומה אני שאשתי מעוברת אבל עכשיו שאינה מעוברת נכסי לפלוני –

I was under the impression that my wife is pregnant, however now that it turns out that **she is not pregnant; my estate should go to that person -**

לסוף נתגלה שהיתה מעוברת וקאמר התם דלא הוי מתנה –

Eventually it become known that she was pregnant, and the ברייתא **rules there that the gift** (to that person) **is void –**

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[7] See later in footnote # 8 why this following case is a 'greater' novelty than the case of אתרוג.

[8] This case is a greater novelty than by אתרוג; for by אתרוג he made one part of the תנאי when he said I am giving you the אתרוג with the stipulation that you return it to me. However, by the case of travelling to א"י it seems that if he would have just indicated that he intends to travel to א"י even if he made no stipulation at all, nevertheless he would be entitled to reclaim his property.

[9] A שכיב מרע is one who is (deathly) ill. The חכמים instituted that his wishes concerning the distribution of his assets should be fulfilled as if they were written and recorded properly.

משום דמעיקרא לא היה בדעתו ליתנם לאותו פלוני אם היתה אשתו מעוברת –

Since initially he had no intent to give it to that person if his wife were pregnant (even though there was no תנאי כפול) and -

הכא נמי לא בעינן תנאי כפול כיון שהיה בדעתו לכך –

Here too by the אתרוג **there is no need for a תנאי כפול since that this was his intent** (without a doubt) to receive his אתרוג back.

תוספות asks:

ואם תאמר ובלא החזירו אמאי לא יצא והא הוי תנאי ומעשה בדבר אחד והתנאי בטל –

And if you will say; and if he did not return the אתרוג **why is he not יוצא, for it is** a case of **תנאי ומעשה בדבר אחד,** where the rule is **that the תנאי is voided** and the act is valid -

כדאמרינן התם[10] (גיטין דף עה,א) **מכדי כל תנאי מהיכא ילפינן מתנאי בני גד ובני ראובן –**

As the גמרא **states there; 'let us see; from where do we derive** the rules concerning **all תנאים, from the תנאי** which משה made with the **ב"ג וב"ר -**

והתם תנאי בדבר אחד ומעשה בדבר אחר הוה –

And there by the ב"ג וב"ר **the תנאי was concerning one item** (going over the ירדן to fight in א"י) **and the act was** concerning **a different thing**; inheriting the land in עבר הירדן. However, here both the תנאי (returning the אתרוג) and the מעשה (gifting the אתרוג) are concerning the אתרוג. In such a case the תנאי (returning the אתרוג) is בטל and the מעשה (gifting the אתרוג) is קיים. It should be a valid gift.

תוספות answers:

ויש לומר התם לא הוי מסקנא הכי ואיכא שינויי אחריני[11] **–**

And one can say; that the conclusion of the גמרא **there is not so** (there are other opinions there who maintain that there is no requirement of תנאי בדבר אחד ומעשה בדבר אחר) **for there are other explanations** why the גט is valid**.**

תוספות offers an alternate resolution:

אי נמי יש לומר הא דלא מהני תנאי ומעשה בדבר אחד –

Or you may **also say; that which a תנאי ומעשה בדבר אחד is not a valid** תנאי -

היינו כששניהם סותרים זה את זה –

That is only **when the two** (the תנאי and the מעשה) **contradict one another -**

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[10] The גמרא there is explaining the משנה there which states that if a man says to his wife I am divorcing you ע"מ that you should return the paper (of the גט) to me; it is a valid divorce. The גמרא concludes that it is not a valid תנאי since it is תנאי ומעשה בדבר אחד; they both revolve around the (giving of the) גט. Since it is not a valid תנאי the מעשה הגירושין is valid. See 'Thinking it over'.

[11] אביי says that it is not a valid תנאי since it was not a תנאי כפול; רבא said since it was not תנאי קודם למעשה, therefore the תנאי is בטל and the מעשה is קיים. They (אביי ורבא) could conceivably argue with the requirement of תנאי בדבר אחד ומעשה בדבר אחר.

כי ההיא דעל מנת שתחזירי לי את הנייר דפרק מי שאחזו (שם) –

As it is in that case of פרק מי שאחזו where the man stipulated, I am giving you the גט **with the stipulation that you should return the paper** of the גט **to me,** in that case the תנאי and the מעשה contradict each other, because -

דהתם סלקא דעתין דכל האומר על מנת לאו כאומר מעכשיו דמי[12] –

There we were under the assumption that whenever someone say על מנת it is not considered as if he states that once the condition is fulfilled the agreement becomes effective retroactively **as of now** (when the stipulation was made)**,** but rather the agreement becomes effective when the condition is met, and therefore -

ונמצא שאינה מגורשת עד שמחזרת הנייר ואז אינו שלה –

It turns out that she is not divorced until she returns the paper to the husband **and** by **then** the גט **is not hers** for she already returned it, so she cannot become divorced for the גט is not in her possession -

אבל הכא סבר דכל האומר על מנת כאומר מעכשיו דמי:

However here it is assumed that whoever says ע"מ it is considered as if he said that the agreement is effective retroactively **as of now** (when the stipulation is made)**.** Therefore when he returns the אתרוג (later) the gift became effective at the moment of the transfer; therefore he is יוצא, since it belonged to the recipient retroactively from the time that he received the אתרוג.

Summary

The requirement of a תנאי כפול is suspended in cases where the intent of the stipulator is clear that the stipulation must be fulfilled otherwise there is no agreement. A case of תנאי ומעשה בדבר אחד invalidates the תנאי (only according to some opinions, or) if the two contradict each other (if we maintain that ע"מ is לאו כמעכשיו דמי), otherwise (if we maintain ע"מ is כמעכשיו דמי) then even תנאי ומעשה בד"א is valid.

Thinking it over

Why is it that concerning תנאי כפול it is the view of תוספות that by certain תנאים this requirement is not necessary, however when it comes to תנאי ומעשה בדבר אחד here תוספות does not argue the same?[13]

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[12] If the husband would say, here is your גט if you return the paper to me. Then it is certain that the giving becomes effective only after she meets the requirement of the stipulation and returns the גט. At which point she cannot become מגורשת, since she is not in possession of the גט. That גמרא however is discussing a case where he said על מנת (with the stipulation that…); in which case it is not certain whether ע"מ is כמעכשיו דמי (and the gift becomes effective retroactively) or it is not כמעכשיו דמי (and it is like he said אם).

[13] See נח"מ (בד"ה בא"ד אמאי) and בל"י אות קנד.