



## Kesubos Daf Beis

### UNAVOIDABLE CIRCUMSTANCES THAT PREVENT ONE FROM FULFILLING A CONDITION THAT HE MADE

בכתובות דף ב': אמר רבא ולענין גיטין אינו כן, אלמא קסבר רבא אין אונס בגיטין. מנא ליה לרבא הא וכו' אלא רבא סברא דנפשיה קאמר, משום צנועות ומשום פרוצות וכו'.

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#### When a stipulation is fulfilled against one's will, it is not considered fulfilled

*A claim of oness regarding stipulations in monetary matters/ Fulfillment of a stipulation against one's will is learned from the possuk "velana'arah lo sa'ase davar"/When there is a clear reason to assume that the stipulation was fulfilled willingly and not against his will/An action that is performed against one's will is not considered as if it has happened of its own accord/ Fulfilling the stipulation against one's will causes that the divorce itself was performed against his will*

-משנה למלך, רש"י, ר"ן, קובץ שיעורים, חידושי רבי שמואל-

א. It is evident from the words of the Gemora that, strictly speaking, there would be a claim of *oness* regarding *gittin*, if not for a particular institution of *Chazal*. This means that if one were to give a get to his wife and stipulate that it will only take effect on condition that he does not return by a certain date, the get would take effect even if he had planned to return in time but was prevented from doing so by unavoidable circumstances. By the strict letter of the law, this is not considered a fulfillment of the stipulation since the events that occurred were out of his control. However, *Chazal*, in order to protect *tzenuos* and *prutzos*, instituted that there is no claim of *oness* regarding *gittin* and the get takes effect irrespective of the *oness*.

The *Mishna Lemelech*<sup>1</sup> writes that from here can be inferred that the opposite would be true regarding stipulations in all other matters. In these cases, if the stipulation was fulfilled by unavoidable circumstances

and against his will, the matter would not take effect. For example, one who obligates himself with a *kinyan* to pay a certain amount of money if he does not come to a certain place by a certain time will be able to use a claim of *oness* if he was prevented from coming by unavoidable circumstances. In this case, the stipulation is considered as not having been fulfilled and the obligation to pay the money does not fall on him.

Several approaches are given by the Rishonim to explain why the *get* would not take effect if not for the institution of *Chazal*.

*Rashi*<sup>2</sup> points out that the claim of *oness* is already mentioned in the Torah,<sup>3</sup> in the *possuk* "velana'arah lo sa'ase davar." This is indicated also in the Gemora in *Nedarim*.<sup>4</sup>

However, the *Ran* in *Nedarim*<sup>5</sup> explains that the reason that the stipulation is not considered fulfilled when it is kept only by *oness* is that there was never any intention to make the stipulation in unavoidable circumstances. When he is eventually unable to come because of events that are not under his control, the stipulation is not fulfilled because he did not have these circumstances on mind when he made it. (According to the *Ran*, the *possuk* "velana'arah lo sa'ase davar" was used only in the initial stages of the Gemora's discussion but not at its conclusion).

*Kovets Shiurim*<sup>6</sup> explains the words of *Rashi* that we learn from “*velana’arah lo sa’ase davar*” that a stipulation that is fulfilled by unavoidable circumstances is not considered as being fulfilled. He cites the *Shut Chemdas Shlomo*,<sup>7</sup> who writes that the *possuk*, “*velana’arah lo sa’ase davar*” does not only teach that there is no punishment given to someone who was coerced to transgress a sin but that an act that was performed under coercion or unavoidably is not considered as having been performed by a person but is considered as having happened by itself. It is because the act of the *na’arah* of the *possuk* was not considered an act of a person that the *na’arah* is exempt from punishment. Similarly, in *Avodah Zara daf 54a*, it is taught that an ox that was served as an idol by someone who was forced to do this is not considered *ne’evad* and is still valid to be a *korban* because an act that was performed under coercion is not considered as having been performed by a person. See more in the Notes and Addenda. [1]

However, *Chiddushei Reb Shmuel*<sup>8</sup> has difficulty with the idea that the *possuk* teaches that fulfillment of a stipulation under unavoidable circumstances is considered as an action that happened by itself. The *possuk* is referring to punishments and it is difficult to learn halachos of stipulations from it. Even according to the reasoning

of the *Chemdas Shlomo*<sup>9</sup> who learns from the *possuk* that an action that is performed under coercion is considered as having happened by itself, it is problematic to stretch this to stipulations made between people.

He therefore explains *Rashi*’s words differently. The *Re’ah* implies that the principle of claims of *oness* regarding *gittin* does not mean that the stipulation is not considered to be fulfilled when there has been an *oness*. Rather, the meaning is that when it is fulfilled under unavoidable circumstances, it is as if the divorce has been given against his will. Since he made the stipulation under the assumption that he will fulfill it, now that he was prevented against his will from fulfilling it, the divorce that occurs as a result would be occurring against his will. “*Velana’arah lo sa’ase davar*” teaches that in the same way that a claim of *oness* will exempt one from punishment for transgressing a sin, so too did the Torah preclude any matter from taking effect when it occurs by *oness*. Therefore, when one stipulates a condition on the assumption that the condition will be fulfilled, when this does not happen because of circumstances beyond his control, it is considered as if the matter took place against his will. For this reason, a claim of *oness* is valid according to the strict letter of the law.

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NOTES

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[1] To explain this matter further we must clarify that the current subject is not similar to the more familiar concept that a sin that is transgressed by *oness* is not considered a sin because the action is considered as having happened by itself. It can be understood well that an act performed under coercion, such as the young girl of the *possuk* who was coerced by a man, is not considered as having been performed by a person. [Some explain further and write that it is not considered as having happened at all]. Regarding a stipulation of “if I do not come by a certain date,” however, which will not be fulfilled by a positive action but by the lack of an action, it could be understood that there is no difference between whether the action was not done deliberately or unintentionally. Since the action that was stipulated did not occur, the stipulation was fulfilled.

However, the explanation is as follows. A “positive” stipulation, such as one who stipulates a divorce on giving a certain amount of money, will not be fulfilled if the money was forcibly taken from him and given to his wife because giving the money by coercion is not considered that he fulfilled the stipulation. In the same way, when the stipulation is “negative,” for example, if he says, “If I do not arrive,” we will understand that the stipulation must be fulfilled by him “not coming.” If he was forcibly held back from coming, this will not be understood as his own fulfillment of the stipulation. Although he did not arrive at the stated time, it was not he who kept the stipulation. Thus, it makes no difference if the stipulation is formulated in a way that obligates him to do something or in a way that obligates him not to do something. In either case, it must be fulfilled by him and not by itself, or in circumstances that are not under his control.

**A stipulation that was not fulfilled because of unavoidable circumstances**

*The difference between when the stipulation is fulfilled because of unavoidable circumstances and when it is cancelled because of such circumstances/The difference between stipulations made when giving a get and stipulations made when giving kiddushin/People do not generally include unavoidable situations in their stipulations/One who gave an esrog on the condition that it will be returned, and it became ruined by oness in the hands of the one who received it*

-רא"ה, משנה למלך, קובץ שיעורים, ר"ן, חתם סופר-

2. The *Chiddushei Hare'ah* writes that the principle mentioned in the Gemora that a stipulation that is fulfilled by *oness* is not considered to be fulfilled is only said regarding an *oness* in the fulfilling of the stipulation but not in the cancelling of the stipulation. For example, if a *get* is given on the condition that it should only take effect if the husband does not arrive by a certain date, this stipulation is not considered to be fulfilled (according to the strict letter of the law) if he was delayed unavoidably. However, if it was stipulated that the *get* should only take effect if he does come within a certain time and he was unable to come within that period, meaning that the *oness* cancelled the stipulation, the *get* is not valid and a claim of *oness* will not help to activate it. In this case, although he was prevented by an *oness* from coming within the stated period, it cannot be said that the *oness* caused the stipulation not to be cancelled. The *get* was given on the condition that he would come within that period, and since he did not come, the *get* is cancelled and the divorce does not take effect.

The *Mishna Lemelech*<sup>10</sup> cites the *Rivash* who writes, similarly, that if the stipulation is cancelled by *oness*, it cannot be claimed that it has not been cancelled.

*Rabi Yochanan* and *Reish Lakish*, in the *Yerushalmi*,<sup>11</sup> disagree about one who gives *kiddushin* on the condition that he will give her a sum of money by a certain date and an *oness* occurred that prevented him from doing so. *Rabi Yochanan* says that the *kiddushin* does not take place because an *oness* is not considered as if the action was done and *Reish Lakish* holds that the *kiddushin* does take place because an *oness* is considered as if the action was done.

The *Kovets Shiurim* writes that the *Yerushalmi* can

be explained according to the *Re'ah*, who distinguishes between an *oness* in the fulfilling of a stipulation and an *oness* on the cancelling of a stipulation. *Rabi Yochanan* holds that the fact he was prevented from giving the woman the money by an *oness* does not allow us to view the situation as if he actually gave it. This is similar to the argument of the *Re'ah* that an *oness* that prevented him from coming in time to activate the *get* does not allow us to view it as if he came, being that, in actual fact, he did not. *Reish Lakish* disagrees and argues with the *Re'ah*. According to him, an *oness* can be considered as if the action was actually done and will be sufficient to allow the *get* to take effect. [The *Kovets Shiurim* is troubled by the fact that the *Re'ah* did not mention that this principle is discussed in the *Yerushalmi*].

However, the *Ran*<sup>12</sup> explains this disagreement between *Rabi Yochanan* and *Reish Lakish* differently. According to him, they argue whether *kiddushin* and *geirushin* can be compared in respect to a claim of *oness*. *Reish Lakish* holds that in the same way that there is a claim of *oness* when one gives a *get* and is prevented from fulfilling the conditions on which it was given, so too when an *oness* prevents him from giving the money on which the *kiddushin* depends, the *oness* causes that it is considered as if he gave it. *Rabi Yochanan* holds that the *kiddushin* does not take effect, unlike *geirushin*. *Geirushin* is dependent entirely on him, and he only desired to divorce her if he would violate the condition willingly but not if uncontrollable circumstances caused him to violate the condition. *Kiddushin*, however, requires the desire of the woman as well as the man's and she only consented to the *kiddushin* in the event that the condition was kept, regardless of *oness*. The *Ran* adds that it seems from the *Yerushalmi* that the *halachah* follows the opinion of *Rabi Yochanan*.

The *Kovets Shiurim* writes that it is clear from the *Ran* that he disagrees with the *Re'ah*'s argument that the claim of *oness* can only be used when the condition was fulfilled unavoidably but not when the *oness* causes the stipulation to be cancelled. The *Ran* explains that *Rabi Yochanan* holds that there is no claim of *oness* in the case of *kiddushin* because of a particular reason i.e., that the

woman only consented to the *kiddushin* in the event that the condition was kept. It is clear that regarding *gittin*, a claim of *oness* could be used to say that although the condition was not fulfilled, the stipulation will not cancel the *geirushin* because it was only the *oness* that prevented its fulfillment.

The *Kovets Shiurim* explains the disagreement between the *Re'ah* and the *Ran*. The reason that the *Ran* holds that a claim of *oness* can be used even regarding a stipulation that is not kept owing to unavoidable circumstances is not that he disagrees in principle to the *Re'ah* and holds that an *oness* can be viewed as having kept the condition. Rather, the *Ran* holds of a particular reasoning that there is a clear assumption that people do not mean to stipulate even in a situation of *oness*. When a stipulation is made, it is assumed that it excluded events of *oness*. Therefore, even when the *kiddushin* was made only on the condition that further money would be given, unavoidable circumstances that prevented him from fulfilling that condition is viewed as a mistake in the stipulation and the stipulation is thus not valid.

As explained above, *Rabi Yochanan* argues on this in respect to *kiddushin*. This is because he holds that since the woman only consented to the *kiddushin* on the assumption that she would receive further money, even if it was an *oness* that prevented her from receiving that money, she does not desire the *kiddushin*. Only regarding *gittin* is the claim of *oness* valid because he had no intention for the stipulation to include situations that are beyond his control.

His words explain the opinion of the *Ran* precisely. The *Ran* in *Kiddushin* mentions the idea that the reason that there is a claim of *oness* regarding *gittin* is that the husband never desired to divorce his wife unless he willingly fulfilled the stipulation. As mentioned above, the *Ran* writes also in *Nedarim* that the underlying principle

of *oness* in regard to stipulations is based on the assumption that people do not mean to include unavoidable situations in their stipulation. Therefore, the *Ran* holds that a claim of *oness* can be made even when the stipulation was “cancelled,” since he did not have such a situation in mind.

The *Chiddushei Chasam Sofer*<sup>13</sup> also argues on the opinion of the *Re'ah*. He disagrees in principle with the distinction that was drawn between a stipulation such as “if I do not arrive” that was kept by *oness* and a stipulation “if I do arrive” that was not kept by *oness*. He holds that although the basis for claims of *oness* regarding stipulations is learned from the *possuk* “*velana'arah lo sa'ase davar*,” an *oness* claim can still be made for a stipulation that was not kept. He proves this because the paradigm *oness* of the *possuk* is similar to the cancelling of a stipulation. The *possuk* is referring to a transgression that goes against the laws of the Torah and nevertheless, the Torah states that no punishment should be given to the *na'arah*. If so, the same should apply to a stipulation that was not kept because of an *oness*. He leaves the opinion of the *Re'ah* as requiring much further investigation.

*Shut Chasam Sofer*<sup>14</sup> mentions that in his *Chiddushim* on *Kesubos* he rejected the *Mishna Lemelech's* distinction between an *oness* in fulfilling a stipulation and an *oness* that cancelled the stipulation. According to the *Chasam Sofer*, even if the *oness* caused the stipulation not to be kept, it is not considered to be cancelled and the *kiddushin* or *geirushin* stands. Based on this, he questions the opinion of the *Rosh*<sup>15</sup> that one who gives an *esrog* on the condition that it is returned after use, the recipient will not have fulfilled his *mitzvah* if he does not return it, even if this was caused by an *oness*. According to his reasoning, since the *esrog* was not returned only because of circumstances that were not under his control, this should not constitute a cancelling of the stipulation and he should be considered to have fulfilled his *mitzvah*.

### מראי מקומות

1. פרק י"א מהלכות מכירה הלכה א' (ד"ה הגה) 2. להלן דף ג'. (ד"ה דמדאורייתא) 3. דברים כ"ב 4. דף כ"ז: 5. שם (ד"ה והתנן) 6. אות ב', ה' 7. סי' ל"ח (אות ד') 8. סי' ב' (אות ד')
9. הג"ל 10. פרק י"א מהלכות מכירה הלכה א' (ד"ה אם) 11. פרק ג' דקידושין הלכה ב' 12. פ"ג דקידושין (דף כ"ה. מדפי הרי"ף) 13. ד"ה אלמא 14. חחר"מ סי' קל"א (ד"ה ודברי) 15. פ"ג דסוכה סי' ל' ובשו"ע או"ח סי' תרנ"ח סעיף ד'