

# HALOCHOSCOPE

## This week's question:

A connoisseur sees items in a garage sale or a flea market stand that he knows are antiques. May he purchase them as 'bargains' without informing the seller of their potential value? Should he anyhow inform the seller, even if he has no need for them himself.

## The issues:

- A) *Ona'ah*, overcharging or underpaying
- B) *Ona'as devarim* and *genaivas daas*, misleading or deceiving without lying; *hashavas avaida*, returning a loss and it's broader implications
- A) *Ona'ah*

*Ona'ah* is loosely translated as cheating but is closer to exploiting. It refers to using or abusing one's position or knowledge to his advantage and to the detriment of another. That is, to overcharge a customer for a purchase, or a buyer paying less than the true value to the vendor. No-one was forced to give up their money nor was it taken. The vendor or purchaser gave it up knowingly. If it fits the guidelines, it is Scriptural forbidden *ona'ah*. The purchase is valid, but the difference must be returned to the exploited party. Both vendor and purchaser are specified in the *passuk* forbidding *ona'ah*.

Not all cases are *ona'ah*. If the price was outrageously off the mark, it is called *bitul mekach*, or *mekach ta'us*, an invalid or mistaken transaction. A total refund must be made. If the overcharge was minimal, *mehilah* is presumed, that the aggrieved party waives or forgives the difference. Calculations are based on a fair market value. If the actual charge is off by one sixth, it is *ona'ah*. If it is less than that, there is *mehilah*. If it is more than that it is *bitul mekach*. The sixth may be calculated as a proportion of the final sale price, which could be a fifth (if it is overcharged) or a seventh (if it is underpaid) of the fair price, or as a proportion of the original, fair value. This leads to an interesting situation where an item's fair value is sixty cents. The charge was seventy-one cents. The vendor will claim that the eleven cent difference is less than the sixth of the final price, which is closer to twelve cents, and it is *mehilah*. The purchaser will claim that it is more than a sixth of the value, which is ten cents, and it is *bitul mekach*. The reverse situation occurs when a buyer pays fifty-one cents for a sixty cent item. Both situations are resolved by using a proportion of the original value, and ignoring the proportion of the actual charge. It is assumed that people are likely to err in valuating an item.

If the purchase is *mekach ta'us*, the prerogative is given to the aggrieved party to choose whether or not to take the refund. For example, say a vendor overcharged an item by a fifth. Then the product increased in real value by a quarter. The vendor might wish to invalidate the sale, to sell it at the new higher fair market price. The buyer may choose to keep it. Similarly, say the buyer underpaid, thinking he got a bargain, and the price

subsequently went down. The buyer wishes to reverse the transaction, so he may buy it now at the lower price. The vendor has the prerogative to accept the sale as final.

There is a time limit to reclaim *ona'ah*. The assumption is that the aggrieved party is unaware at the time of sale that he is being exploited. [If he is aware, he is willingly giving up his claim.] Therefore, the aggrieved party is given enough time to find out about the real price. A purchaser, who has the item in hand, is given enough time to show it to a dealer. This can depend on his location. A vendor does not have the item in hand to show it to a dealer. Therefore, he is given enough time to come across a similar or identical item and to find out the real price.

If it was sold by an agent of the vendor, even a minor loss is sufficient to invalidate the transaction. The vendor can claim that his agent was never authorized to cause him any loss at all. A broker is in this category. Sales clerks might have some discretion, depending on rules, policies and situations.

The Talmud debates whether the rate for *ona'ah* is lower for a currency transaction. We follow the view that it is a twelfth. Certain purchases, including land, are excluded from *ona'ah*. Some poskim follow a ruling in the Talmud that land is included in *ona'ah*, but at a higher rate. If both parties know the price is wrong, but go through with the transaction anyhow, it could be excluded from *ona'ah*. This depends on certain factors and how the deal was made. It is possible that a person under financial pressure might be happy to sell off his possessions at a lower price than the fair market value. He might be considered waiving any claims to *ona'ah*. On the other hand, he might be unaware, and unwilling to lose more money.

If an item turns out to be different than the item agreed to in the deal, or of inferior quality, the Talmud says that this is *bitul mekach*, even if the difference in price is low. However, if they were indeed good quality, but it turns out that the seller thought that they were not as good as they actually are, the buyer can keep them.

The Talmud discusses items that have no fixed market value. There are a few such situations, including a jewel or a farm animal. The buyer might be willing to pay more for an item that he needs to pair up with something he has. In modern terms, this might be an old part for a product, or a missing volume in a set that is out of print. We follow the majority view that this is not taken into consideration. If it were, any sale could be viewed in some way like this. However, there are items that have a value based on something other than its actual worth. For example, a family heirloom might be worth very little, but has a high sentimental value for which the family would pay more. Generally, the value of an item is whatever people are willing to pay for it in a fair market. Therefore, some poskim maintain that if there is no known market value, there can be no *ona'ah*. Similarly, some poskim maintain that if this particular buyer feels that it is worth this amount for him, there is no *ona'ah*.

This leads to some discussion about antiques. They are generally priced at a much higher rate than their true worth. However, many antiques have a known market value. Therefore, they are included in *ona'ah*. There could be certain antiques that only have more value if there is a known buyer, or if it is known that buyers are competing for the item. This might not be easy to find. Furthermore, an item might have no known buyers

yet, but a savvy dealer can generate the interest. In this case, the current value is very low, but it will increase later. The value should be determined according to the time of the original deal. The increase is the result of the work of the dealer.

Some poskim maintain that the concept of *mechilah* up to a sixth has conditions. If there is a fixed market price in every store, one may not overcharge or undersell at all. Furthermore, even if the price varies around a fair market value, if a vendor or purchaser is more savvy than the other party, and knows the true price, he should not take advantage of the other party. While the purchase will stand and *mechilah* is assumed after the fact, it is forbidden to knowingly deprive another of any amount more than a *perutah*, the smallest amount considered worth negotiating.

Accordingly, if an expert knows that an antique has a known value in the trade, he may not knowingly take advantage of the vendor. If there is no true market, but the expert knows that it is worth more than the price advertised, there is no *ona'ah*, as explained. However, there could be other considerations that invalidate the sale, such as the realization that it is like an item that was higher quality than originally thought. [See *Parshas behar* 25:14. *Kesubos* 100a *Kidushin* 8a 42b *Baba Metzia* 49b-58b, *Poskim*. *Tur Sh Ar* CM 227 232:1 18 233:1, commentaries. *Pische Choshen Ona'ah* 10:2 12-13, notes.]

#### **B) *Ona'as devarim* etc.**

In our case, there might be no commercial *ona'ah*. However, it might still be forbidden to purchase the item at that price without at the very least informing the vendor of its possible higher value. There could be three violations: There are two explicit *mitzvos* forbidding *ona'ah*. In context, one of them is clearly referring to commercial *ona'ah*. The context of the second mention is less obvious. The Talmud explains that it refers to *ona'as devarim*, using words to take advantage of someone. This can be in the form of an outright insult, or in a more subtle way. For example, one may not ask someone a question on a subject with which he is unfamiliar in order to embarrass him. One may not remind someone of his or his antecedents' disreputable past.

Another form of *ona'as devarim* would be to give someone the false expectation of earning money. For example, if a salesman is looking to unload his wares, one may not direct him to someone who will definitely not buy them. One may not inquire about the price of an item with no intention of buying it. This *mitzvah* is *masur lelev*, dependent on the integrity of the individual. The seller or salesman may never know the original intent. He will think that the customer lost interest upon hearing the price, or that the person directing him to the potential buyer really believed there was a chance he would purchase. In one view, one may not even express interest in an item by staring at it, if he has no money with which to purchase it, also known as window shopping. We do not follow this opinion, but it teaches us something about the meaning of *masur lelev*.

It is possible that the entire concept of *ona'as devarim* would not apply in our case. The purchaser is not teasing the vendor. Rather, he is letting him believe that he is paying the advertised price without revealing that he is getting a bargain. There is no active teasing. The vendor will not feel bad, at least presently. It is possible that at some future time, the vendor will discover that he could have made more money, but he will not necessarily think that this buyer knew that. He will not feel cheated.

The second violation could be *genaivas da'as*, literally, stealing another person's mind or opinion. Generally, stealing involves monetary gain. However, the Talmud derives from various *pesukim* that *genaivah* applies even in certain cases where there is no monetary gain. One form of such stealing, which is apparently forbidden Scripturally, is *genaivas daas*. One may not deceive others by making a misleading appearance but not lying outright. Examples in the Talmud include cases where a deceiver causes the deceived undue stress, disappointment, or even false flattery. One example might be the aforementioned case of entering a store to inquire about prices with no intent of purchasing. In addition to *ona'as devarim*, one might be in violation of *genaivas daas*. The difference is that whereas *ona'as devarim* specifically applies to exploiting a Jew, *genaivas daas* applies to a non-Jew as well. One may not flatter a guest by telling him that one opened a new bottle of wine for him, if the old bottle was anyhow empty. A Jew may not give non-kosher meat to a gentile unless he informs him that it is not kosher. Otherwise, the gentile will be under the illusion that a Jew gave him something he considers special.

In our case, the the poskim suggest that one may not make the purchase without informing the vendor of the potential higher value. Thus, even if there is no known market for the antique, and therefore, no known market value, but it is definitely an antique, the expert should inform the vendor before purchasing it. The Talmud condemns *genaivas daas* in strong terms. It is a type of thievery that cannot be repaid. Therefore, repentance is more difficult than for regular robbery. He might be able to mislead or to deceive people, but nothing is hidden from Hashem.

A third possible violation would be *hashavas avaida*. If the expert does not want to purchase the item, does he still have an obligation to educate the vendor? The Torah requires one to return a lost item to its owner. In our case, the owner has not lost it. However, due to his ignorance, he might lose out by selling it cheap. By informing the seller, the expert is preventing a loss. If the seller knowingly sells it for less, it would be considered *avaida mida'as*, knowingly giving up ownership. However, he does not know. One is required to save another Jew from a loss. This extends to information that can prevent a loss, such as informing judges or litigants about a mistake in a case that cannot be retried.

Indeed, the very rule that a purchaser or vendor is given the opportunity to consult an expert or dealer shows that the dealer or expert has the obligation to reveal the true value. There is no indication that the consultant is specifically paid for this service. [See Refs to section A. Kesubos 19b Tosefta Baba Kama 7:3 Baba Metzia 58b 61b 96a Chulin 94a, Poskim, Tur Sh Ar CM 228 etc., commentaries. Chofetz Chayim Rechilus 9:10-11.]

In conclusion, the expert should inform his fellow Jew about the potential value, but if the vendor sells it to him anyhow at the cheaper price, he may buy it.

*On the parsha ... .. Israel .. borrowed from Egypt silver vessels ... [12:35]* Why was this not considered *genaivas da'as*? The Bnei Yisroel knew that they would never return the borrowed items! Some say it was a gift [see *Rashbam*]. Perhaps, since the Egyptians pressured Yisroel to take them [see *Rashi*], it could be considered *avaida mida'as*.

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