

## Does that not mean with a wall

## מאי לאו בכותל –

### OVERVIEW

The גמרא attempts to refute the היזק לא שמיא ראייה based on the משנה of חולקין. The גמרא assumes that the term חולקין indicates dividing by means of a wall. We infer from the משנה that if it is a חלוקה then the דין is דיין שיש בה דין חלוקה. That proves that the initiator can compel his partner to build a wall – ה"ר ש"ה. The תוספות will challenge this refutation. Even if we assume that חולקין means with a wall, it does not necessarily prove that ה"ר ש"ה.

תוספות asks:

תימה ויהא בכותל דילמא הכי פירוש –

**It is astounding!** Granted **that** they divide it **with a wall**, however that does not prove that היזק לא שמיא ראייה, for **perhaps this is the interpretation** of this משנה

אין חולקין את החצר אפילו האחד רוצה לבנות את הכותל בתוך שלו –

**A cannot be divided** (if it is a חלוקה) **even if one of the partners wants to build the wall on his share** of the property; nevertheless he cannot coerce his partner to divide (since it is a חלוקה שיש בה דין חלוקה) –

עד שיהא בה ד' אמות לכל אחד –

**Unless there will be four אמות for each** of the partners. This is what the משנה states, according to this interpretation. From this we will infer –

הא אם יש בה ד' אמות לכל אחד חולקין אם רצה לכנוס ולבנות בתוך שלו<sup>1</sup> –

**However if there is four אמות for each of them, then they divide**, provided **if the initiator is willing to go into his own property and build** the wall there. Otherwise he cannot coerce his partner to divide with a wall (even if it is a חלוקה שיש בה דין חלוקה).

תוספות answers:

ויש לומר דחולקין משמע באמצע<sup>2</sup> –

**And one can say; that the word חולקין to divide, implies** that the division is exactly **in the middle**.

תוספות explains now why the word חולקין implies in the middle and not as proposed previously.

<sup>1</sup> The initiator can never coerce his partner to build a wall. The entire discussion was only concerning the division of the property, with the assumption that the wall will be built by the initiator only, and on his property.

<sup>2</sup> The s'gמרא assumption is that חולקין means with a wall. תוספות is now telling us that חולקין implies that the division [with a wall] must be in the middle. The wall thus has to be in the middle. Each partner must contribute (at least his space) to the wall. Therefore we can conclude that היזק לא שמיא ראייה.

דאי אשמועינן כדפירישית הוה ליה למיתני אין עושין כותל בחצר עד שיהא כולי:<sup>3</sup>

**For if the משנה is coming to teach us as I previously explained;** namely that we are discussing whether one of the partners has the right to erect a wall (on his property), then **the משנה should have stated, 'A wall cannot be erected in a חצר unless there is etc.,** ד' אמות for each partner'.

### SUMMARY

If it is assumed that חולקין means dividing a property by erecting a wall; then the משנה of שיש בה דין חלוקה is teaching us that we divide a property by having each of the partners contribute (space) to the wall jointly. This proves that ה"ר ש"ה. Otherwise, if the משנה would only be discussing the right of the initiator to compel his partner to allow him to build a wall on his own property, then the משנה should have stated אין חולקין וכו' but not אין עושין כותל בחצר עד שיהא וכו'.

### THINKING IT OVER

1. According to the תוספות of אמינא, what would be the rules concerning dividing a חצר without a wall; both by a חלוקה שאלין בה דין חלוקה and by a חצר שיש בה חצר חלוקה?
2. Could we learn פשט in the משנה of חולקין the way תוספות originally proposed, regardless whether we maintain ה"ר ש"ה or not?

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<sup>3</sup> According to the proposed explanation, this is the thrust of the משנה, whether a partner can coerce his neighbor to allow him to build a wall on his own. Why mention חולקין which implies an equal division?! That proves that the משנה is discussing an equal division of property with a joint wall built on both their properties.