

Does not that mean that they divide it with a wall – מאי לאו בכותל

Overview

The גמרא attempts to refute the היזק ראייה לא שמיה היזק, based on the חצר שיש בה דין חלוקה. 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 חולקין. That proves that the initiator can compel his partner to build a wall – ה"ר ש"ה will challenge this refutation. Even if we assume that חולקין means with a wall, it does not necessarily prove that ה"ר ש"ה.

asks: תוספות

It is baffling! Granted that they divide it with a wall however that does not prove that היזק ראייה שמיה היזק, for –

perhaps this is the interpretation of this משנה **דילמא הכי פירושא**

A חצר cannot be divided (if it is a חלוקה) – **אין חולקין את החצר**

even if one of the partners wants – **אפילו האחד רוצה**

to build the wall on his share of the property; nevertheless he cannot coerce his partner to divide (since it is a חלוקה) – **החצר שאין בה דין חלוקה**

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 –

however if there is four אמות for each of them, then – **הא יש בה ד' אמות לכל אחד**

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). 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.

answers: תוספות

one can say; that the word 'חולקין' – to divide, implies that the division is exactly **in the middle**. The גמרא's 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 ראייה שמיה היזק.

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

דאי אשמועינן כדפירישיה – 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 – הוה ליה למיתני

החצר – אין עושין כותל בחצר – A wall cannot be erected in a

תוספות for each partner. 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.

Summary

If it is assumed that חולקין means dividing a property by erecting a wall; then שיש בה דין משנה of אין חולקין וכו' 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 עושין כותל בהצר עד שיהא חולקין וכו' and not אין חולקין וכו'.

Thinking it over

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