

וכיון<sup>1</sup> דרצו בונין את הכותל בעל כרחו –

**And since they wanted, they build the wall against either one's will**

## **OVERVIEW**

The גמרא proposed an alternate reading of the משנה. The word מחיצה is translated as a division, and the thrust of the משנה is as follows; once the partners agreed to divide the חצר, each can enforce building a dividing wall. Generally when people own something in partnership either party can independently dissolve the partnership and divide it. Why would there be a need for an agreement to divide the חצר. In addition, what is the relevance of this agreement to divide, to the teaching of our משנה? The משנה is ultimately concerned about the wall, not about the division! תוספות will address these issues.

-----  
לקמן<sup>2</sup> מוקי לה כשאין בה דין חלוקה<sup>3</sup> –

**Later the גמרא will interpret** our משנה, which requires that they both must first agree to divide, and only then can one coerce the other to build a wall jointly; that our משנה is discussing a חצר **where it is not legally enforceable to divide**.

תוספות asks:

ותימה לרבינו יצחק דאמאי נקט תנא דמתניתין באין בה דין חלוקה וקתני רצו –

**And the ר"י is perplexed; why does the תנא of our משנה discuss a case where it is not legally enforceable to divide, and therefore the תנא must state 'רצו' –** they wanted to divide the חצר -

**לא ליתני רצו ולאירי בשיש בה דין חלוקה<sup>4</sup> –**

---

<sup>1</sup> It may prove helpful to first study the גמרא on ג,א from 'וכו' until after the parenthetical text that ends with (יחלוקו). See also מאי ד"ה מאי.

<sup>2</sup> דף ג,א.

<sup>3</sup> The משנה states (דף יא,א) that one partner cannot coerce the other partner to divide their joint חצר, unless there is four אמות space for each partner after the division. [An object cannot be forcibly divided between שותפים, unless after the division each part retains its original status. A חצר less than אמות ד', is not considered a viable (usable) חצר. A חצר of a total space less than אמות ח' is a חלוקה בה דין חלוקה, unless, of course, both partners agree to divide.] If there is less than that amount of space, then neither can coerce the other to divide. Our משנה is discussing such a חצר. Therefore it is required that they first both agree to divide the חצר – לעשות מחיצה – חצר, and (only) then, one can coerce the other to build a dividing wall jointly, since היזק ראייה שמים היזק.

<sup>4</sup> According to this לשון that לשון היזק, the תנא wants to teach us that either partner can coerce the other to jointly build a wall. The תנא should have just stated that one party can coerce the other to build a wall. Why the preamble that they wanted to divide a חצר שאין בה ד"ח? It seems totally unnecessary. All the משנה should say is 'השותפין שחלקו בונין את הכותל וכו' or something similar. By a חצר שיש בה ד"ח either partner can coerce the other to both: a) divide the חצר, since it has a דין חלוקה, and in addition, to b) build a wall.

**The תנא should not state 'רצו' at all in the משנה and let the תנא discuss a case where there is a חלוקה דין!**

answers: תוספות

**ותירץ דקא משמע לן דסלקא דעתין בשאין בה דין חלוקה –**

**And the ר"י answered that the תנא comes to teach us something concerning the דין of building a כותל by a ח"ה for it may have entered our minds that by a חצר שאין בה דין חלוקה, if one originally agreed to divide but now refuses to build a wall -**

**דמצי למימר כי איתרצאי<sup>5</sup> לך לחלוק על מנת שלא לעשות גודא –**

**That he may say that when I agreed to you to divide the ח"ה, it was on the condition that there be no obligation to build a wall -**

**אבל על מנת לעשות גודא לא איתרצאי<sup>6</sup> לך<sup>7</sup> –**

**But that we should divide on the condition to ultimately make a wall, I never agreed to you to divide under such circumstances. The משנה teaches us however, that once both partners agree to divide (even a חצר שאין בה ד"ח) then either one can coerce the other to build a wall jointly.<sup>8</sup>**

**ויש ספרים דמקשין ומתרץ כן להדיא בשילהי שמעתין:<sup>9</sup>**

**And there are texts of גמרות that clearly ask and answer this very same question at the end of the discourse.**

## **SUMMARY**

According to the לשון that מחיצה means division then the משנה is discussing a חצר חלוקה. That is why their consent for division is necessary. The novelty of this דין is that neither can claim that my agreement to divide was based on the assumption that there will be no wall.

## **THINKING IT OVER**

How are we to understand the ה"א that one party can claim I never agreed to a

<sup>5</sup> The הגהות הב"ח amends this to read אתרציתי.

<sup>6</sup> The הגהות הב"ח amends this (too) to read אתרציתי.

<sup>7</sup> If the משנה would have just told us the obligation to build a wall by a ח"ה, we may have mistakenly assumed that by a חצר שאין בה ד"ח, then either one can refuse to build a wall, by arguing that his initial agreement to divide was contingent that there would be no (additional expense, or loss of area by building a) wall. Our agreement to divide will be cancelled retroactively if you insist on building a wall. See: 'Thinking it over'.

<sup>8</sup> The reason, according to the ר"א, is because once we assume that שמה היזק, then it is assumed that if they agreed to divide, it is implicit in their agreement to build a wall to remove the היזק ראייה.

<sup>9</sup> דף ג,א in parenthesis on גמרא is referring to the תוספות.

wall:<sup>10</sup> Does it mean that therefore you have no claim against me and there will be no wall? Or does it mean that if you insist on the wall, the division is null and we go back to sharing the חצר together?<sup>11</sup>

---

<sup>10</sup> See footnote # 7.

<sup>11</sup> See בל"י אות כה.