

**And since they want to divide, they build the wall even against either one's will .** <sup>1</sup> **וכיון<sup>1</sup> דרצו בונין את הכותל בעל כרחו**

### Overview

The **משנה** proposed an alternate reading of the **גמרא**. 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! The **תוספות** will address these issues.

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**Later<sup>2</sup> – לקמן מוקי לה** the **משנה** **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.** The **משנה** states<sup>3</sup> 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<sup>4</sup>. 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** – **השותפין שרצו לעשות מחיצה**, and (only) then, one can coerce the other to build a dividing wall jointly, since **היזק ראיה שמיה היזק**.

asks: **תוספות**

**The ר"י is perplexed;** **ותימה לרבינו יצחק**

**why does the תנא of our משנה discuss a case - דאמאי נקט תנא דמתניתין**

**where it is not legally enforceable to divide;** **חצר** a small **חצר**

**and therefore the תנא must state 'רצו' – they wanted** to divide the **חצר** **– וקתני רצו**

**the תנא should not state 'רצו'** at all in the **משנה** **– לא ליתני רצו**

**and let the תנא discuss a case where there is a דין** **– ולאירי בשיש בה דין חלוקה**

**חלוקה!** According to this **לשון** that **היזק ראיה שמיה 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** **השותפין שחלקו בונין את**? It seems totally unnecessary. All the **משנה** should say is **הכותל וכו'** or something similar. By a **ח** **ח** **ח** either partner can coerce the other to both: a) divide the **חצר**, since it has a **חלוקה** **דין חלוקה**, and in addition, to b) build a wall.

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

<sup>2</sup> **דף ג,א**.

<sup>3</sup> **דף יא,א**.

<sup>4</sup> 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 **חצר**, unless, of course, both partners agree to divide.

answers: תוספות

**and the תנא comes to teach us** – **and the ר"י answered that** something concerning the דין of building a ח"ה by a חצר שאין בה ד"ה

**for it may have entered out minds that by a חצר שאין בה דין חלוקה** – **for it may have entered out minds that by a חצר שאין בה דין חלוקה**, if one originally agreed to divide but now refuses to build a wall -

**that he may say that** – **דמצי למימר**

**when I agreed to you to divide** the ח"ה חצר שאין בה ד"ה, it was **כי אתרצאי לך לחלוק** – **on the condition that there be no obligation to build a wall** – **על מנת שלא לעשות גודא**

**but that we should divide on the condition to ultimately make a wall** – **אבל על מנת לעשות גודא**

**I never agreed to you** to divide under such circumstances<sup>5</sup>. If the משנה would have just told us the obligation to build a wall by a ח"ה חצר שיש בה ד"ה, we may have mistakenly assumed that by a חצר שאין בה ד"ה, 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. The משנה teaches us however, that once both partners agree to divide (even a חצר שאין בה ד"ה) then either one can coerce the other to build a wall jointly<sup>6</sup>.

**there are texts of גמרות that clearly ask and answer** this very same question – **ויש ספרים דמקשין ומתרין כן להדיא**

**at the end of the discourse**<sup>7</sup>. – **בשלהי שמעתין**

### Summary

According to the לשון that מחיצה means division then the משנה is discussing a חצר חצר. 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 הו"א that one party can claim I never agreed to a wall: 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>5</sup> Our agreement to divide will be cancelled retroactively if you insist on building a wall. See: 'Thinking it over'.

<sup>6</sup> The reason, according to the ר"א, is because once we assume that ה"ר שמיה 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 ראיה.

<sup>7</sup> דף ג,א is referring to the גמרא in parenthesis on ג,א.