

הוה אמינא במסיפס¹ בעלמא –

I might have said that they divide the חצר with just a מסיפס.

OVERVIEW

The גמרא stated that (according to the מ"ד that מחיצה is a wall) if the משנה would have written בונין את הכותל instead of בונין אותו, I would have thought that it meant merely with a מסיפס. It is not clear what the גמרא means by this. Seemingly it means to say that they would be required to divide the חצר with only a מסיפס. However this presents a difficulty. A מסיפס, as רש"י points out, and as is evident later in the גמרא, is the minimal division between two properties. If the שותפין agreed to divide, that implies that they agree to a מסיפס; how else can they divide?! Why would the משנה need to tell us that they are required to build a מסיפס? On account of this difficulty, רש"י offers a novel explanation. תוספות will offer his explanation first, then cite רש"י's interpretation and reject it.

פירוש² ורצו דקתני אמסיפס –

The explanation of the גמרא's response במסיפס הו"א means that when the משנה states 'רצו' they wanted, it is referring to a מסיפס; they agreed to build a divider.³ There is no need to agree to divide, since it is a חצר שיש בה דין חלוקה.

anticipates a difficulty with this interpretation:

ואף על גב דבלאו רצו נמי עושין מסיפס בעל כרחם –

And even though that if they did not agree to build a מסיפס they can still be forced to build a מסיפס by either party -

כדמוכח בסמוך⁴ דקאמר⁵ מאי לאו בכותל לא במסיפס –

As is evident shortly for the גמרא says; does that not mean a wall; that they divide by making a wall? To which the גמרא replies no; it refers to a מסיפס. They divide the חצר with a מסיפס. It is evident from that גמרא that each partner can coerce the other to divide and build a מסיפס. How can the גמרא have a הוה אמינא that they need to agree to build a מסיפס!

¹ A מסיפס is some type of demarcation between adjoining properties. The actual meaning of a מסיפס in this גמרא is a point of contention between רש"י and our תוספות.

² תוספות is rejecting רש"י's interpretation that רצו refers to חלוקה. See our תוספות later.

³ It would be difficult to interpret תוספות literally; that they agreed specifically to build a מסיפס. If that were the case, then even according to the מסקנא they would only be obligated to build a מסיפס not a כותל. Rather, תוספות may mean that they agreed to build a מחיצה, without specifying whether it is a כותל or a מסיפס.

⁴ See the גמרא further on this עמוד.

⁵ The גמרא inferred from a later משנה that if there is a חלוקה, then one can coerce the other to divide.

– במסיפס answers: When that גמרא states that they divide תוספות

היינו מסיפס גרוע –

That means an inferior מסיפס; a מסיפס of inferior building materials, such as wood, etc.; that type of מסיפס one can coerce his neighbor to build jointly at their common border when they divide -

אבל כי רצו עושין מסיפס מגויל וגזית⁶ כמנהג המדינה –

However when they want and agree to build a divider; which is the case the משנה is discussing (according to this אמינא (הוה), then **they** are required on the insistence of either partner to **build a מסיפס from either גויל or גזית as is the custom of the country.**

How is this גזית מגויל מסיפס distinguishable from a גזית מגויל? תוספות explains:

ומקרי מסיפס לפי שהוא מלא חלונות כדפירש בערוך ואינו מגין מהיזק ראייה⁷ –

And it is called a מסיפס, even though it is built from גויל וגזית, **for this מסיפס wall is full of windows as the ערוך explains and this מסיפס does not protect one from היזק ראייה** since it is full of windows. This distinguishes it from a כותל which is a solid wall and protects from היזק ראייה.

כותל and a מסיפס offers an alternate difference between תוספות

אי נמי לפי שאינו גבוה י'⁸ כדמוכח לקמן⁹ גבי גג הסמוך לחצר¹⁰ –

Or you may also say that it is called a מסיפס, even though it is built with גויל וגזית, **because it is not ten טפחים high, as is evident later in the גמרא concerning a roof adjacent to a [גג] (חצר).** Concerning which -

דאמר רב נחמן עושה לו מעקה גבוה י' –

- high טפחים ten (protective) fence ר' נחמן said, he is required to make a

ופריך למאי אי להיזק ראייה ד' אמות בעינן ואי לנתפס כנגב במסיפס סגי¹¹ –

And the גמרא challenges ר' נחמן; **what is the purpose of this מעקה!? if it is to prevent היזק ראייה from one roof to the other we require a wall that is four אמות**

⁶ תוספות is introducing us to a new type of מסיפס. It is a מסיפס wall built from גויל וגזית. This type of מסיפס cannot be built by coercion; rather they both have to consent to build it.

⁷ This would fit in well with this מ"ד that מחיצה means a wall; and also maintains that היזק לא שמייה היזק. The משנה, if it would have stated בונין אותו, would be teaching us a different חידוש than it is currently teaching us. Even if they both agreed to build a מחיצה, nevertheless they are only required to build this מסיפס from גויל וגזית, even though it will not protect them from היזק ראייה. The מסקנא is however, that since the משנה does state בונין את הכותל, that teaches us that even if they agreed to build a מחיצה without specifying whether it is a מסיפס or a כותל, nevertheless they have to build a כותל, even though היזק לא שמייה היזק. See "Thinking it over" # 1.

⁸ For a wall to be considered a כותל it needs to be at least ten טפחים high. Less than ten טפחים is called a מסיפס

דף ו, ב.

¹⁰ The gloss amends חצר to גג. [עיי"ש בגמרא. מחיצה should then be amended to מעקה.]

¹¹ See "Thinking it over" # 2.

high, not ten טפחים **and if** the purpose of the מעקה is to divide the roofs so if one trespasses into the other's roof **he will be caught** and deemed to **be a thief**, then a מסיפס **is sufficient** for that purpose. We do not need a מעקה of ten טפחים. It is obvious from that גמרא that a מסיפס is less than ten טפחים high.

According to תוספות there are three types of walls relevant to our discussion. 1. A מסיפס גרוע made up of inferior materials, 2. A regular מסיפס made of גויל וגזית that is either a) full of windows, or b) lower than ten טפחים. 3. A solid wall four אמות high. The גמרא says that if the משנה would have stated 'השותפין וכו' בונין אותו' instead of 'השותפין וכו' בונין את הכותל', I would have understood the משנה to mean as follows: Once the שותפין [divided (בע"כ), and] agreed to build a divider,¹² they must follow the מנהג and build a מסיפס of גויל וגזית וכו', but are not required to build a wall.

will now cite רש"י's interpretation and reject it:

ובקונטרס פירש¹³ דרצו דקתני אחרונה קאי –

And רש"י explained that according to this ה"א: that the word 'רצו' 'they wanted' that the משנה states is referring to the division of the חצר. Our תוספות understands רש"י as follows: The משנה is now discussing ([even] according to the מ"ד that מחיצה is a wall) a חצר חצרה. The שותפין agreed to divide this חצר. Once the שותפין agreed to divide, they can be coerced to build a מסיפס but not a כותל (presumably since היזק לא שמהי היזק).

רש"י asks on תוספות:

ותימה דהא אסיק דמחיצה היינו גודא דאי פלוגתא לחצות מיבעי ליה¹⁴ –

And this interpretation is astounding! for the גמרא just concluded that the word 'מחיצה' in the משנה means a wall (according to this לשון), for if the word מחיצה would mean a division, then the משנה should have stated לחצות not מחיצה.

now questions the supposition that a מסיפס גרוע would be sufficient, since it says אותו and not כותל.

ועוד היכי מצי למימר דהוה אמינא במסיפס בעלמא –

And furthermore, how can the גמרא say that I may have thought (if it would say אותו and not כותל) that the divide merely with a מסיפס and not with a wall –

הא שמעינן ליה מסיפא¹⁵ דקתני אבל בזמן ששניהם רוצים אפילו פחות מכאן יחלוקו –

But we know this from the סיפא of our משנה, which states: However if they both

¹² See footnotes # 3 & 7.

¹³ רש"י ד"ה הוה.

¹⁴ The opinion of this לשון is that the word מחיצה cannot mean a division; it can only mean a wall. How can we now say that if the משנה would not say כותל, I would think that מחיצה means they want to divide?! Whether the משנה writes כותל or אותו cannot change the meaning of מחיצה.

¹⁵ בע"כ. The משנה states that if the חצר is less than אמות ח' we cannot divide it דף יא,א.

want to divide even if the חצר is less than eight אמות, they can divide. What is the meaning of this division? How will it be apparent that the חצר is divided?

והיינו לכל הפחות במסיפס –

This obviously means that they will divide the חצר **at least with a מסיפס גרוע**. Why then would our משנה have to tell us the same דין again that they divide a חלוקה with חצר שאין בה דין חלוקה a מסיפס?

רש"י asks a final question on תוספות

ועוד היכא הוה מצי למימר במסיפס בעלמא הא בהדיא קתני במתניתין גזית וגויל:¹⁶

And in addition, how can we have thought that if the משנה would say 'אותו', we would divide **only with a mere מסיפס**, which according to רש"י means small pegs, **but the משנה clearly states** that you must build it with **גויל וגזית**. גויל וגזית are certainly

SUMMARY

הו"א במסיפס בעלמא differ as to the explanation of רש"י and תוספות.

introduces two types of מסיפס. A מסיפס גרוע is made of inferior materials. The מסיפס discussed here is a wall made of גויל וגזית; either with many windows or a wall less than ten טפחים (either case cannot protect from ראייה). The explanation of the גמרא is as follows: We are discussing a חצר שיש בה דין חלוקה. The חצר divided the שותפין (בע"כ). They agreed to build a מחיצה. If it would say בונין אותו, I would have thought that we can only obligate the partner to build a מסיפס of כותל וגזית, but not a גויל וגזית.

רש"י interprets the גמרא as follows: The משנה is now discussing a חצר שאין בה דין חלוקה. The שותפין agreed to divide this חצר. Once the שותפין agreed to divide, they can then be coerced to build a מסיפס but not a כותל.

תוספות poses three difficulties with this interpretation:

1. How can מחיצה meant to divide according to this לשון.
2. We know from the following משנה that if חצר שאין בה ד"ח divided a שותפין, that they build a מסיפס. Our משנה is superfluous.
3. How could I have thought that they build a מסיפס (of pegs) when the משנה clearly states גויל וגזית.

THINKING IT OVER

1. According to תוספות which would be the greater חידוש; if the משנה would have written אותו and it would mean a מסיפס or the משנה writing כותל and meaning a

¹⁶ For a clarification and defense of רש"י see רמב"ן (explained in דוד אות צו).

¹⁷? כותל

2. What proof is there from רב נחמן that a regular מסיפס is less than טפחים?
Perhaps the גמרא there is referring to a מסיפס גרוע?¹⁸

3. Usually תוספות cites רש"י's interpretation first, refutes it, and then presents his own interpretation. Why did this תוספות present his interpretation first?

4. Why would רש"י not agree to תוספות's interpretation?¹⁹

¹⁷ See footnote # 7.

¹⁸ See footnote # 11.

¹⁹ See גמ"מ (בד"ה ובקונטרס).