

מאי קא משמע לן בשאין בה דין חלוקה –

What is the משנה teaching us; when it cannot be divided legally

OVERVIEW

The גמרא cited the לישנא אחרינא which maintains ה"ר ש"ה. Either partner can coerce the other to build a wall jointly. The reason the משנה says רצו, which indicates it has to be done willingly; no coercion is permitted, is because the משנה is discussing a חלוקה בה דין חלוקה. In such a חצר, no one can coerce the other to divide, unless they both agree. That is the meaning of השותפין שרצו; they agreed to divide the חצר. Once however they agreed to divide this חצר, then either partner can coerce the other to jointly build a wall. The גמרא then questions this interpretation. The question reads (literally, somewhat) as follows: 'what are you teaching us; that by a חצר שאין בה ד"ח they may willingly divide; we have already learnt this elsewhere'¹! A cursory reading of this question would indicate that the questioner assumed that our משנה is (only) teaching us the rules of dividing a חצר שאין בה ד"ח. Therefore he asks we already know these rules from elsewhere! תוספות will challenge this assumption, that all the משנה is teaching us are the rules of division. The משנה is teaching us (in addition) that הרש"ה! What therefore is the גמרא's question?! מאי קמ"ל question

anticipates the following question:

אף על גב דקא משמע לן דשמיה היזק?

Even though the משנה teaches us that היזק ראייה is considered damage. How can the גמרא ask מאי קמ"ל, when the משנה is teaching us הרש"ה!?

replies:

הכי פירושו³ מאי קא משמע לן במאי דאיירי באין בה דין חלוקה –

This is the explanation of the גמרא's question. **What is the משנה teaching us more by discussing** a case of a חצר **which is** חצר שאין בה ד"ח, and telling us that in this situation הרש"ה -

לישמעינן בשיש בה דין חלוקה [אף על גב דלא רצו]⁴ (כשרצו) פלגי –

¹ The idea that שותפים may agree to divide a חצר שאין בה ד"ח, should be understood to mean, that once they contractually agree to divide, neither can retract his agreement.

² Why does the גמרא assume that the משנה is only teaching us that partners may divide a חצר שאין בה ד"ח; and therefore asks that this rule has already been taught elsewhere, where in fact the משנה is teaching us a new דין that הרש"ה. This דין was not taught in any other משנה.

³ The גמרא knew that the משנה is not just teaching us the דין that by a חצר שאין בה ד"ח the partners may willingly divide. It is understood that the משנה is teaching us the דין of הרש"ה. Rather the גמרא's question is as follows:

Let the משנה **teach us** this same דין of הרש"ה in a חצר **that has** חלוקה⁵, and the משנה teaches us that **even though** one of the partners **did not want** to divide, nevertheless **we divide** and force him to jointly build a common wall.⁶

explained that the question of מאי קמ"ל, is not merely that our משנה is superfluous since we know this דין from 'אימתי בזמן' but rather the question is why teach the דין of הרש"ה by אין בד"ה, instead of by יש בד"ה. When we see the גמרא's answer to this question 'אוי מהתם הו"א וכו' it seems however that the גמרא is responding only to the question that our משנה is superfluous, but not to the question that תוספות proposes, i.e. why teach הרש"ה by אבד"ה instead of יבד"ה. תוספות responds to this issue.

[ותירץ](תימה)⁷ הא קא משמע לן דאפילו באין בה דין חלוקה⁸ –

And the גמרא answered, **this is what the משנה is teaching us**, by telling us the דין of חצר שאין בד"ה **that even if the חצר is אבד"ה** -

דאיכא למימר על מנת לעשות גודא לא איתרצאי⁹ כדפירש¹⁰ לעיל¹¹:

Where it is possible for the reluctant partner to argue that **I did not agree to divide if it results in my obligation to build a wall**,¹² as was explained **previously** in תוספות. We may have thought that the reluctant partner has a strong argument and is exempt from building the wall. Therefore, our משנה teaches us that (even by 'רצו') חצר שאין בד"ה, once he agrees to divide the חצר, he is obligated to jointly build a wall.

SUMMARY

Without תוספות we assume the following. The גמרא understands that the משנה by stating 'שרצו' is teaching us that by חצר שאין בד"ה they may willingly divide. The

⁴ The translation follows the text in the [brackets]; not in the (parenthesis).

⁵ The משנה should not have said שרצו indicating that willingness is required to divide the חצר, which limits the דין of the משנה to a חצר שאין בד"ה. This rule that a חצר שאין בה דין חלוקה may be divided willingly, we know from the משנה of 'אימתי בזמן וכו'.

⁶ This may be a greater חידוש than by אין בד"ה. For by אבד"ה since he agreed to divide and we assume that הרש"ה, it would seem that he agreed even to build a wall. However, by יבד"ה where he never agreed to divide; the whole division is against his will, perhaps in such a case I may think that he is not obligated to build a wall.

⁷ The translation will be following the גירסא of the מהר"ם, namely ותירץ; not the printed גירסא in our תוספות (and (גירסת מהרש"א) which reads 'ותימה'. See 'Appendix'.

⁸ By חצר שיש בד"ה, the reluctant partner has no choice; he must divide since it is יש בד"ה and he must build a wall since הרש"ה.

⁹ By חצר שאין בד"ה it is required that they both agree to divide.

¹⁰ Perhaps this should be emended to read 'כדפירש ר"י' or 'כדפירשתי'.

¹¹ דף בב, ד"ה וכיון עיי"ש.

¹² When the גמרא answers the question and states 'אוי מהתם הו"א וכו' במסיפס בעלמא' it means as follows: If our משנה would state the דין of הרש"ה by חצר שיש בד"ה, we may (mistakenly) think that even though we maintain הרש"ה, but by חצר שאין בד"ה, we may falsely assume that the reluctant partner can say, 'I agreed to divide this חצר with a גויל וגזית of כותל, but not with a מסיפס'.

asks that this דין was already taught elsewhere. The גמרא answers that from our משנה we know, that not only do they divide, but they must also build a כותל. תוספות asks how can the גמרא assume that the משנה is only teaching us that they may divide a ח"ה, חצר שאין בד"ה, when it is obvious that the משנה is teaching us the דין of הרש"ה. Something the other משנה does not teach us. תוספות explains that the גמרא originally knew that the משנה is teaching us הרש"ה. Nevertheless the question is why teach הרש"ה by a ח"ה חצר שאין בד"ה as opposed to a חצר שיש בד"ה. The גמרא answers that even if we knew that הרש"ה by a ח"ה חצר שיש בד"ה, we may still think that by a ח"ה חצר שאין בד"ה one cannot coerce the reluctant partner to build a wall. The reluctant partner may argue that I only agreed to divide if I do not have to build a wall. Our משנה teaches us that this is not a valid argument and even by a ח"ה חצר שאין בד"ה he is required to build a wall jointly.

THINKING IT OVER

According to the מסקנא, is the משנה also teaching us the rule that by ח"ה חצר שאין בד"ה, they may divide (and then not be permitted to retract)?

APPENDIX

The translation has followed the view of the מהר"ם who is 'ותירץ'; גורם 'ותירץ'; that תוספות is explaining the answer of the גמרא.¹³ Out text however reads (and the מהרש"א enforces it) 'ותימה'; that תוספות is challenging the גמרא's question of 'מאי קמ"ל'.

According to this גירסא the explanation of תוספות may be as follows.

תוספות explains the question of the גמרא: Why does the משנה teach us the rule of ח"ה חצר שיש בד"ה, חצר שאין בד"ה, the משנה should have taught it to us by ח"ה חצר שיש בד"ה. In ח"ה חצר שיש בד"ה there is a greater חידוש;¹⁴ that even though the reluctant partner did not even agree to divide (as opposed to ח"ה חצר שאין בד"ה), nevertheless, he can be

¹³ There are difficulties with the מהר"ם's view. Firstly is the change in the text from what actually appears in the תוספות. Secondly according to the מהר"ם the answer of the גמרא which states 'ומסיפס בעלמא וכו' is not the complete answer. The complete answer would require that which תוספות states: 'ע"מ לעשות גודא לא אתרצאי', which does not appear in the גמרא. A third difficulty is that in a previous (תוספות ב,ב ד"ה וכיון) it seems that תוספות there asks and answers the same question and answer that our תוספות maintains is the גמרא's question and answer here. תוספות there however, stated that according to some texts this question and answer that תוספות is proposing actually is found in the גמרא. It is assumed that תוספות is referring to the גמרא in parenthesis beginning with ("ל"א וכי רצו וכו"). However, according to the מהר"ם, our גמרא itself, before the parenthesis, is asking and answering the same question and answer of that תוספות. Why does תוספות say that (only) in some texts does this question and answer appear, when in fact it appears in all texts according to the מהר"ם. The following interpretation according to the גירסא of the מהרש"א (seemingly), removes all these difficulties.

¹⁴ See footnote # 6.

coerced (not only to divide, but also) to jointly build a wall. The fact, that the משנה ignores this reasoning and teaches us this דין by a חצר שאין בד"ח indicates that the משנה wants to teach us [also] the laws of dividing a חצר שאין בד"ח; that once they agreed (contractually) to divide they cannot retract this agreement.¹⁵ The גמרא therefore asks, that the laws of agreeing to divide a חצר שאין בד"ח are already clearly stated; why repeat them. To which the גמרא answers, that it is true that the laws of division were already stated; however from that other משנה we may have thought that the rule that once they agreed to divide they cannot rescind, is only when they agree to a מסיפס. However if one partner insists on a כותל, then the other partner has the right to retract his agreement. The חצר would then revert to its original status of a חצר שאין בד"ח.¹⁶ Our משנה therefore teaches us that they cannot retract this agreement even if one partner insists on a כותל.

however, challenges the assumption of the גמרא. Why did the גמרא assume that our משנה wants to teach us the laws of division; when in reality our משנה wants to teach us the דין of הרש"ה? The reason the משנה teaches this to us by a חצר שאין בד"ח is because (contrary to the questioner's assumption) the greater חידוש of הרש"ה is not by a חצר שיש בד"ח (as the מקשן assumed), but rather by a חצר שאין בד"ח. We may have thought that by a חצר שאין בד"ח the reluctant partner can argue I never agreed to divide with a wall. Therefore the חלוקה will remain without a wall; היזק cannot force one to build a wall by a חצר שאין בד"ח.¹⁷ That is why the משנה teaches us the דין of הרש"ה by a חצר שאין בד"ח, but not because the משנה wants to teach us any דין concerning dividing property. What therefore is the גמרא's question!?! תוספות does not offer an answer.

¹⁵ See footnote # 1.

¹⁶ The גמרא did not think, even in the ה"א, that he could retain the division and refuse to build a wall. According to the גמרא the assumption of the מקשן; namely that there is a greater חידוש to build a wall by a חצר שיש בד"ח, remains. Therefore if he would want to retain the חלוקה by a חצר שאין בד"ח he would have to build a wall, with a כ"ש from a חצר שיש בד"ח. The גמרא (in the ה"א) is discussing only the issue of 'רצו'; that it is possible to break the agreement by a חצר שאין בד"ח, if the partner insists on having a wall. Our משנה, when it states 'שרצו' is teaching us a דין in חלוקה, not (only) a דין in ראייה.

¹⁷ See footnote # 16 above. This can perhaps explain the difference between תוספות asking 'ותימה' and the גמרא's answer of 'וכי' that they are not identical. The גמרא is discussing the חלוקה ביטול while תוספות is discussing היזק וצ"ע ודו"ק. ראייה.