

**From four – מארבע אמות ולמעלה אין מחייבין אותו כו' בחזקת שלא נתן אמות and higher we do not obligate him to pay etc., it is assumed that he did not pay.**

### Overview

The משנה teaches that if a dividing wall collapsed in a חצר, either neighbor can be coerced to rebuild the wall up to four אמות. However neither can be coerced to pay for rebuilding the wall above four אמות even if the original wall was higher than four אמות. If one of the neighbors ("A") rebuilt the wall on his own and subsequently the other neighbor ("B") indicated that he is pleased with this new wall (by building an adjacent wall) and intends to make use of it, then he is obligated to share the expense of the wall above the four אמות. Furthermore if 'B' claims that he had already paid 'A' for the addition, he is not believed unless he can provide proof of payment<sup>1</sup>. תוספות is troubled by this last ruling. Why is 'B' not believed? How indeed do we know that 'A' built the wall himself? Perhaps 'B' built the wall. Granted that 'B' agrees that 'A' built the wall; he merely claims that he paid his share to 'A'. However 'B' should be believed that he paid since he has a מיגו<sup>2</sup>. He could have claimed the he, not 'A', built the additional section<sup>3</sup>. תוספות will answer this question.

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The משנה is discussing a situation where - איירי

- כגון דידעינן - for instance it is known to us (בי"ד) -

- דקדם חד וארציה לחבריה - that one of the parties ('A') proceeded to persuade his friend ('B') to rebuild the wall

- and 'B' was reluctant to rebuild the wall. תוספות goes on to prove that this situation is actually implied in the משנה.

- as the language of the משנה indicates, for the משנה states that - כדמשמע לישנא

- we do not obligate him ('B') to rebuild the wall above four אמות. אין מחייבין אותו

The fact that the משנה states that 'we do not obligate him', indicates that he is reluctant

<sup>1</sup> Generally a defendant (נתבע) is not required to prove that he paid a debt. On the contrary, it is the responsibility of the plaintiff (תובע) to prove that he is owed money. In this case however, it is the responsibility of the נתבע to prove that he paid for his share in the wall above four אמות. The גמרא explains this on עמוד ב' (cited by רש"י here in the בחזקת ד"ה). It is presumed (חזקה) that a person will not pay a debt unless it is clear (to him) that he actually owes the monies. It is not obvious that by merely building an adjacent wall, one is liable to share in the expenses of the (common) raised wall above אמות ד'. Therefore it is presumed that the נתבע will not pay for the heightened wall unless he is coerced by the בי"ד.

Consequently the נתבע must prove that he indeed paid for the raised wall. See footnote.# 3

<sup>2</sup> See מהר"ם.

<sup>3</sup> Even though there is a חזקה that the נתבע did not pay (see footnote # 1), nevertheless this should be considered (at least) as a מיגו במקום חזקה (see the גמרא later עמוד ב' סוף עמוד ב'), which may be a valid מיגו.

and does not want to rebuild the wall<sup>4</sup>. Indeed ב"ד supports his rights of refusal and does not obligate him to share the expense of building above ד' אמות. However ב"ד is now aware that he does not want to raise this wall -

**and therefore it is understood why it is assumed that he did not pay** for the rebuilding of the wall above four אמות. It is known to ב"ד that he refused to participate in building the wall. It can be therefore safely assumed that the party who was encouraging the building of the wall ('A') did indeed build it himself. The reluctant party does not have a מיגו that he could have claimed that he built it himself, since it is known that previously he refused to participate in building the wall. Once there is no מיגו it is presumed that he did not pay<sup>5</sup>.

**and it is not necessary to qualify** the משנה that it is discussing a case where 'A' **made a הוית** to prove that he built it himself<sup>6</sup>. We can assume that 'A' built it himself even if there is no הוית, as long as ב"ד is aware that 'B' refused to participate in building the wall.

### Summary

The defendant ('B') is not believed that he already paid for the wall in a case where ב"ד is aware that he originally refused to participate in building the wall (above ד' אמות). In such a case he does not have the מיגו that he built the wall (himself). It is therefore assumed that the plaintiff ('A') built the wall. This same ruling would obviously apply if 'A' built a הוית indicating that he alone built the wall.

### Thinking it over

1. What would be the דין if 'B' claimed that he built the wall himself (even after he originally refused to raise the wall)?

<sup>4</sup> Just as in the רישא when the משנה states מחייבין אותו it means that he is obligated to build the wall initially; here too it means that he is not obligated to participate in raising the wall higher than ד' אמות. Without this inference (had the משנה not stated 'אין מחייבין אותו'), we could have mistakenly interpreted the משנה to be discussing a case where the wall was already rebuilt above four אמות and the תובע ('A') demanded that 'B' pay him for the entire wall. In this case if 'B' would claim that he already paid him he may be believed and not be obligated to pay, for he has a מיגו that he could have claimed that he ('B') built the (entire) wall. Now however that the משנה states מחייבין אותו, this indicates that we are discussing a stage before the wall was rebuilt (above ד' אמות); where 'A' is demanding that 'B' should contribute to rebuild the wall (above ד' אמות) and 'B' refuses. In this case 'B' loses his מיגו.

It would seem that (the same would be) if the תובע had עדים that the נתבע refused to pay him at any time after the נתבע finished building his wall. The נתבע would subsequently also not be believed to claim פרעתי; for he forfeited his מיגו by virtue of his refusal to pay. תוספות however chooses the case of where the נתבע refused to participate in initially enlarging the wall (above ד' אמות) since that is what is inferred from the expression 'אין מחייבין אותו' (instead of פטור מלשלם or likewise). See footnote # 6.

<sup>5</sup> See footnote # 1.

<sup>6</sup> תוספות rejects the possibility that the משנה is discussing a case where 'A' built a הוית; for this is not at all implied in the משנה. However the case of refusal is indeed implied in the משנה. See footnote # 4.

2. Would there be an advantage to say that the משנה is discussing a case where 'A' made a חזית?
3. Why is it necessary to infer from the משנה that בי"ד is aware that one party refused to build the wall; it is seemingly obvious that one party refused, for otherwise there would be no issue?!<sup>7</sup>
4. תוספות states it is not *necessary* to qualify the משנה that it is discussing a case where the תובע made a חזית. It would seem to be problematic if the משנה is discussing a case of a חזית; how would we then explain the רישא that it is חזית?!<sup>8</sup> if there is a בחזקת שנתן

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<sup>7</sup> See footnote # 4.

<sup>8</sup> עי' נח"מ וסוכ"ד סי' לה.