The Burger Court Opinion Writing Database

Goldstein v. Cox

396 U.S. 471 (1970)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January

Re: No. 66 - Goldstein v. Cox

Dear Thurgood:

I join in your revised (1/21/70) opinion in the light of the representations of counsel in argument as to what the New York Surrogates are now doing, no problems should arise.

WEB

W. E. B.

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 21, 1970

Re: No. 65 - Breen v. Selective Service Local Board No. 16, Bridgeport, Conn.

Dear Hugo:

Please join me.

Sincerely,

T.M.

Mr. Justice Black

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 66.—October Term, 1969

Circulated: 1/22/70

Recirculated:

Anghel Goldstein aka Andrei Pietraru et al., Appellants, *v.* Joseph A. Cox et al.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1970]

Mr. Justice Douglas, dissenting.

If summary judgment* had been granted to appellants, there would be no question but that this Court would have jurisdiction under 28 U. S. C. § 1253 over an appeal from that judgment, as it would constitute an "order granting . . . an interlocutory or permanent injunction." Similarly, there seems little room for argument that the denial of summary judgment to appellants constitutes an order "denying . . . an interlocutory or permanent injunction," since such injunctive relief was requested in appellants' complaint. The majority opinion relies

*The appellants' motion for summary judgment was as follows:

"Plaintiffs move the court as follows:

"1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law; and, especially, in the light of *Zschernig* v. *Miller*, 36 L. W. 4120 (1/15/68), decided by the Supreme Court of the United States.

"The Affidavit of John R. Vintilla is attached hereto in support of this motion."

The "relief demanded in the complaint" included:

"That [the District] Court issue *a permanent injunction* forever restraining and enjoining the defendants and each of them, their agents and employees, from denying plaintiffs, and others similarly situated the right to their distributive shares from decedents' estates, and to other funds to which they may be entitled; that

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Fortas~~
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 66.—October Term, 1969

Circulated:

Recirculated: 1-23

Anghel Goldstein aka Andrei Pietraru et al., Appellants, *v.* Joseph A. Cox et al.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1970]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

If summary judgment* had been granted to appellants, there would be no question but that this Court would have jurisdiction under 28 U. S. C. § 1253 over an appeal from that judgment, as it would constitute an "order granting . . . an interlocutory or permanent injunction." Similarly, there seems little room for argument that the denial of summary judgment to appellants constitutes an order "denying . . . an interlocutory or permanent injunction," since such injunctive relief was requested in appellants' complaint. The majority opinion relies

*The appellants' motion for summary judgment was as follows:
"Plaintiffs move the court as follows:
"1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law: and, especially, in the light of *Zschernig* v. *Miller*, 36 L. W. 4120 (1/15/68), decided by the Supreme Court of the United States.
"The Affidavit of John R. Vintilla is attached hereto in support of this motion."
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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Fortas~~
Mr. Justice Marshall

From: Douglas, J.

Circulated: _____

Recirculated: 1-2-

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1969

Anghel Goldstein aka Andrei Pietraru et al., Appellants, v. Joseph A. Cox et al. | On Appeal from the United States District Court for the Southern District of New York.

[January 26, 1970]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

If summary judgment [1] had been granted to appellants, there would be no question but that this Court would have jurisdiction under 28 U. S. C. § 1253 over an appeal from that judgment, as it would constitute an "order granting . . . an interlocutory or permanent injunction." Similarly, there seems little room for argument that the denial of summary judgment to appellants constitutes an order "denying . . . an interlocutory or permanent injunction," since such injunctive relief was requested in appellants' complaint.[2] The majority opinion relies

[1] The appellants' motion for summary judgment was as follows:

"Plaintiffs move the court as follows:

"1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law: and, especially, in the light of Zschernig v. Miller, 36 L. W. 4120 (1/15/68), decided by the Supreme Court of the United States.

"The Affidavit of John R. Vintilla is attached hereto in support of this motion."

[2] The "relief demanded in the complaint" included:

"That [the District Court] issue *a permanent injunction* forever restraining and enjoining the defendants and each of them, their agents and employees, from denying plaintiffs, and others similarly

January 6, 1970

Re: No. 66 - Goldstein v. Cox

Dear Thurgood:

Like Brother Stewart, I am pretty well convinced on the basis of your memorandum that jurisdiction in this case does not exist, and that the appeal should be dismissed.

Sincerely,

J.M.H.

Mr. Justice Marshall

CC: The Conference

January 23, 1970

Re: No. 66 - Goldstein v. Cox

Dear Thurgood:

I agree with your revised opinion, dismissing the appeal for want of jurisdiction. May I add that I think that your opinion is a very convincing one.

Sincerely,

J. M. H.

Mr. Justice Marshall

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 22, 1970

RE: No. 66 - Goldstein v. Cox

Dear Thurgood:

I agree with your opinion that you circulated on January 21, 1970.

Sincerely,

W.J.B. Jr.

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 6, 1970

No. 66 - Goldstein v. Cox

Dear Thurgood,

For the reasons indicated in your memorandum, I think the Court does not have jurisdiction of this appeal, and that the appeal should accordingly be dismissed.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 21, 1970

No. 66 - Goldstein v. Cox

Dear Thurgood,

I am glad to join the opinion you have written for the Court in this case, circulated today.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

January 5, 1970

No. 86 - Goldstein v. Cox

Dear Thurgood:

I join your opinion for the Court in this case. The jurisdictional question may go either way in my view. In any event, I doubt that it is worth much energy arguing that an interlocutory order denying an interlocutory injunction is appealable but that there is no appeal from an interlocutory order denying a permanent injunction, even in terms of strictly construing the "direct appeal" statute.

Sincerely,

H.A.B.

Mr. Justice Marshall

cc: Conference

December 30, 1969

Memorandum for the Conference

From: Thurgood Marshall
Re: No. 66 - Goldstein v. Cox

Attached is an opinion on the merits which represents my judgment of what the Conference voted for -- an affirmance confined as nearly as possible to merely upholding the New York statute on its face. However, in working on the case I have come to doubt whether this Court has jurisdiction of the appeal, for reasons briefly sketched below.

The statutory basis of our notation of probable jurisdiction was 28 U.S.C. §1253, which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

In this case, appellants moved for summary judgment, which motion the District Court denied with an opinion. Though appellees requested that the complaint be dismissed (App. 30), this request was not granted, and the District

Court's only order was the interlocutory one denying summary judgment, and hence apparently clearing the case for trial. (App. 4, 41.) Since if summary judgment had been granted to appellants, the District Court might have issued a permanent injunction, we apparently assumed that the order was one "denying . . . an interlocutory or permanent injunction" within the meaning of §1253.

This would clearly follow if §1253 could be read as giving us jurisdiction on appeal over interlocutory orders denying permanent injunctions. However a review of the history of the Three-Judge Court Act leads me to the conclusion that the only interlocutory orders meant to be reviewed by this Court on appeal are those explicitly granting or denying preliminary injunctions. This is perhaps clearer from the language of the statute as enacted, §266 of the old Judicial Code (see Robertson and Kirkham, 1951 ed., at 346-347, n.2):

"An appeal may be taken direct to the Supreme Court

". . . and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." (Emphasis added).

The reading is confirmed by the history behind the Act, which showed legislative concern with the granting of preliminary injunctions, pending often lengthy litigation in the district courts, against the social and economic legislation enacted by the states during the Progressive Era. See Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795 (1934). Only later was the Act amended to allow appeals from orders granting or denying ~~permanent injunctions; its original thrust was solely~~ against injunctions pendente lite. Robertson and Kirkham, at 347-348.

As I read §1253, then, it gives us jurisdiction over only two classes of orders: (1) final orders granting or denying injunctions, and (2) orders granting or denying preliminary injunctions. There is no question that an order denying summary judgment is not a final order, so it only remains to determine whether the District Court

On the side of an affirmative answer are the following factors: appellants prayed for both permanent and preliminary injunctions in their original complaint (App. 9); and in moving for summary judgment, they requested "the relief prayed for in the complaint" (App. 17).

On the other side, one can only note a total absence of any procedural move aimed specifically at obtaining preliminary injunctive relief. A prayer for such relief in a complaint is not sufficient basis for a district court to grant it. Rule 65, F. R. Civ. P., provides that a preliminary injunction shall not be granted without notice to the other side, and without a hearing. Rule 65(a)(2) explicitly contemplates a "hearing of an application for a preliminary injunction;" here there is nothing to be construed as such an application, unless the pro forma reference to "the relief prayed for in the complaint" found in the motion for summary judgment fulfills that function. Most important, neither of the parties, nor the District Court, addressed themselves

at any point to the equitable considerations involved in granting or denying an application for preliminary injunctive relief.

In these circumstances, the matter seems a close one to me. On the one hand, a statute is doubly to be narrowly construed which gives us mandatory jurisdiction over interlocutory orders of the District Courts. (The courts of appeals have no mandatory jurisdiction to review denials of summary judgment, but review them only upon the certificate of a district judge and then only in the exercise of their discretion, under the Interlocutory Appeals Act, 28 USC §1292(b).) I have found no case in which we have reviewed a denial of summary judgment under §1253; our review of interlocutory orders under that provision has been confined to three-judge court orders explicitly ruling on the appropriateness of preliminary relief. See Robertson and Kirkham, §196, and cases cited therein.

On the other hand, as a practical matter this case is likely soon to be terminated if we send it back to the District Court. Appellants seem to have little desire to go to trial (as is shown by the fact that they appealed here), and it may be that they have no competent evidence of misapplication of the New York statute to put on. It would be a substantial waste of judicial time to send the case back for a final order, only to hear argument on the same merits again on the appeal which would inevitably follow. Finally, there is the matter of fairness to the parties. We noted probable jurisdiction, rather than postponing the question until argument on the merits. Thus the parties, neither of whom contested jurisdiction, were not on notice that it would be in question, so that neither of them have briefed or argued the point.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

From: Marshall, J.

Circulated: DEC 31 19

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1969

Anghel Goldstein aka Andrei Pietraru et al., Appellants, *v.* Joseph A. Cox et al.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1970]

Mr. Justice Marshall delivered the opinion of the Court.

Appellants are beneficiaries of New York decedents' estates who live in Romania. Their shares of these ibuted to them, but have benefit under § 2218 of the t Procedure Act. Section e to order an alien's share into court when it appears e the benefit or use or con- constituting the share.[1]

of the New York Surrogate's

hat an alien legatee, distributee dent within a country to which funds of the United States may ny executive order, regulation or ted States government or any court shall direct that the money would otherwise be entitled shall of said alien or the person or ar to be entitled thereto. The urt shall be paid out only upon

Supreme Court of the United States
Memorandum
12/31, 19 65

Dear Bill
I hope you write in dissent in 66 Goldstein v. Cox. If so, please join me, and I write Harlan and what he writes will
Mr Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 21, 1970

MEMORANDUM TO THE CONFERENCE

Re: No. 66 - Goldstein v. Cox

I earlier circulated an opinion affirming on the merits, and in an accompanying memorandum expressed my doubt that we have jurisdiction. Because of the jurisdictional problem, it now seems that there is no Court for the affirmance. In any case, further research has convinced me that we lack jurisdiction, and I submit the enclosed opinion to that effect for the consideration of the Conference.

T.M.

Enclosure

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

From: Marshall, J.

Circulated: 1-21-70

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1969

Anghel Goldstein aka Andrei Pietraru et al., Appellants, *v.* Joseph A. Cox et al.	On Appeal from the United States District Court for the Southern District of New York.

[January —, 1970]

Mr. Justice Marshall delivered the opinion of the Court.

Appellants are beneficiaries of New York decedents' estates who live in Romania. Their shares of these estates have not been distributed to them, but have been paid into court for their benefit under § 2218 of the New York Surrogate's Court Procedure Act. Section 2218 authorizes the surrogate to order an alien's share of a New York estate paid into court when it appears that the alien "would not have the benefit or use or control of the money or property" constituting the share.[1]

[1] Section 2218, formerly § 269–a of the New York Surrogate's Court Act, reads as follows:

"1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon

STYLISTIC CHANGES THROUGHOUT.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

From: Marshall, J.

Circulated: _____

Recirculated: 1-23-7

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1969

Anghel Goldstein aka Andrei Pietraru et al., Appellants, *v.* Joseph A. Cox et al.	On Appeal from the United States District Court for the Southern District of New York.

[January 26, 1970]

Mr. Justice Marshall delivered the opinion of the Court.

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