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What motion for reconsideration is pending? Both the petition and the comment of the private respondent state that the motion for reconsideration has been resolved; it has been denied.

We grant the petition because the record shows lack of notice to the defendant, now the petitioner, throughout the proceedings in the lower court. This is violative of procedural due process and shows poor court management.

WHEREFORE, the petition is granted. The orders issued by the respondent judge are set aside and he is directed to see to it that the petitioner is properly served with summons. Costs against the private respondent.

SO ORDERED.

Makasiar (Chairman), Concepcion Jr., Escolin, and *Cuevas, JJ.*, concur.

Aquino, J., concur. The petitioner should be given 15 days from notice to answer the complaint.

SECOND DIVISION

[G.R. No. L-48667. July 12, 1985]

ANDRES PATALINGHUG, *petitioner, vs.* **THE HON. COURT OF APPEALS and MARIO G. KIMSENG,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *MANDAMUS*; DISMISSAL THEREOF, WHEN PROPER.— A review of the record of this case does not show any hint that petitioner was denied of his right to appeal. He had all the opportunity to

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question the decision complained of before the Intermediate Appellate Court through a petition for review (pursuant to R.A. 5434) but he failed to do so despite the lapse of the reglementary period for filing said petition. Unquestionably then, respondent court's dismissal of his petition for *mandamus* being in accordance with law is in order.

2. **ID.; ID.; UNLAWFUL DETAINER; IMMEDIATE EXECUTION OF JUDGMENT, ALLOWED.**— The case at bar being one of unlawful detainer, immediate execution may issue if the judgment is in favor of the plaintiff-owner in order to prevent further damages to him arising from the loss of possession.

3. **ID.; ID.; ID.; ID.; HOW IMMEDIATE EXECUTION MAY BE PREVENTED.**— Defendant-lessee may prevent immediate execution by 1) perfecting an appeal (in the instant case by filing a petition for review); 2) filing a supersedeas bond; and 3) by depositing or paying from time to time either to the plaintiff or to the court the reasonable value for the use and occupancy of the property as fixed in the judgment appealed from. None of the aforesaid requisites had been complied with nor undertaken by the petitioner.

D E C I S I O N

CUEVAS, *J.*:

Petitioner in this Petition for Review seeks the annulment of the Resolution dated June 29, 1978 of the defunct Court of Appeals in CA-G.R. No. SP-07790, dismissing his petition for "*MANDAMUS* WITH PRELIMINARY INJUNCTION" against the then Court of First Instance of Cebu, thereby assailing the decision of said court in Civil Case No. R-16474, together with the Writ of Execution issued in the aforesaid case.

Private respondent Mario G. Kimseng is the owner of a parcel of land situated in Sanciangco Street, Cebu City, known as Lot No. 703 of the Cebu Cadastre covered by TCT No. 55044 in his name. Sometime in 1947, his mother verbally leased the aforesaid lot to the herein petitioner at a rental of ₱60.00 a month, the same to be used as a garage and office for the

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latter's trucking business. Petitioner then constructed a building thereon which was utilized as an office and living quarters for his sons and employees, and paid the rentals due and owing as days went by.

Sometime, however, in 1970, petitioner stopped paying the agreed monthly rentals because his father-in-law allegedly informed him that respondent Kimseng is not the true owner of the lot in question. Because of petitioner's failure and/or refusal to pay rentals which amounted to ₱3,840.00 covering the period from September 1970 to December 1975, despite various repeated demands therefor, respondent Kimseng filed on February 4, 1976 with the then City Court of Cebu-Branch VII, an ejectment suit against the herein petitioner which was docketed as Civil Case No. R-18216. After trial, judgment was rendered, the dispositive portion of which reads as follows:

"IN VIEW OF THE FOREGOING CONSIDERATIONS, judgment is hereby rendered ordering defendant to pay plaintiff the amount of ₱3,840.00 representing rental in arrears from September 1970 to December 1975 and every succeeding months thereafter at ₱60.00 when the same is due and payable; ₱500.00 attorney's fees; and to pay costs.

SO ORDERED."

From the aforesaid judgment, plaintiff now private respondent, appealed to the then Court of First Instance of Cebu which docketed his appeal as Civil Case No. R-16474. Disposing of plaintiff-respondent's appeal, the then Court of First Instance rendered judgment modifying the decision of the City Court in the following manner:

"WHEREFORE, in view of the foregoing, judgment is hereby rendered:

1. Ordering the defendant to vacate the premises within fifteen days from date of this decision; and

2. To pay ₱60.00 a month plus 6% from September 1970 to the time defendant vacate the premises in question with costs against defendant."

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Petitioner was served with a copy of the aforesaid decision on January 11, 1978. On January 23, 1978, he filed a motion for reconsideration. His motion was, however denied. Copy of the Order of denial was served upon him on February 28, 1978.

Two (2) days before receipt by the petitioner of the order denying his motion for reconsideration or more specifically on February 26, 1978, respondent Kimseng filed a Motion for Execution which was granted in an Order, copy of which was served upon the petitioner on March 21, 1978.

Questioning the implementation and/or enforcement of the Writ of Execution issued, petitioner on April 17, 1978, went to the then Court of Appeals by way of *MANDAMUS*. The petition was however dismissed in a Resolution issued by the said Court on June 29, 1978.

Hence, this petition.

In the *MANDAMUS* suit instituted before the then Court of Appeals, petitioner asked that respondent Judge (of the Court of First Instance) be ordered to allow him to perfect his appeal or file a petition for review. He also questioned the manner by which the challenged writ of execution was implemented claiming that the enforcement thereof was in violation of Sec. 14, Rule 39 of the Rules of Court.

A review of the record of this case does not show any hint that petitioner was denied of his right to appeal. He had all the opportunity to question the decision complained of before the Intermediate Appellate Court through a petition for review (pursuant to R.A. 5434) but he failed to do so despite the lapse of the reglementary period for filing said petition. Unquestionably then, respondent court's dismissal of his petition for *mandamus* being in accordance with law is in order.

The reason for such a significant inaction is not hard to divine. Petitioner was in all probability laboring under the wrong impression that simply because a writ was already issued for the execution of the questioned decision, his right to appeal had already been foreclosed. This is not so. The case at bar

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being one of unlawful detainer, immediate execution may issue if the judgment is in favor of the plaintiff-owner in order to prevent further damages to him arising from the loss of possession. Defendant-lessee may prevent immediate execution by 1) perfecting an appeal (in the instant case by filing a petition for review); 2) filing a supersedeas bond; and 3) by depositing or paying from time to time either to the plaintiff or to the court the reasonable value for the use and occupancy of the property as fixed in the judgment appealed from.[1] None of the aforesaid requisites had been complied with nor undertaken by the petitioner.

WHEREFORE, the instant petition is hereby DISMISSED with costs against petitioner.

SO ORDERED.

Makasiar, Concepcion Jr., Abad Santos, and *Escolin, JJ.*, concur.

Aquino, J., concurs. A frivolous appeal which should not have been given due course. It considerably prejudiced the landlord.

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[1] Section 8, Rule 20, Rules of Court; *Salinas vs. Navarro*, 126 SCRA 167; *Lit vs. Llamas*, 118 SCRA 215; *Balagtas Realty Corporation vs. Romillo, Jr.*, 114 SCRA 415.