Karnataka High Court Bhimappa And Ors. vs Allisab And Ors. on 27 February, 2006 Equivalent citations: 2007 (6) KarLJ 286 Author: N Kumar Bench: N Kumar ORDER 3 RULES 1,2-Purpose and object of-Whether Order HI CPC deal with the Power of Attorney Holder exhaustively-HELD-The primary object of Order III Rule 1 CPC is to enable a party to perform certain acts before the Court, which he would have been otherwise required to do in person through recognized agent or pleader. The other object is to prevent perpetration of fraud by unauthorized person who poses himself to be the agent of a party before a Court. Order III Rule 2 contemplates the persons who are authorized to act. No unauthorized person can take part in the proceedings before a Court of law. Order III does not deal with the rights of parties who appear in person in Court, Order III Rule 1 CPC enacts a general rule and confers only procedural right. There are other modes of appearances, applications, or acting, expressly prescribed by the Code for particular cases, e.g., Order 33 Rule 3 and Order 44 Rule 1 CPC which, by reason of the words "except where otherwise provided by any law for the time being in force" are taken out of the operation of the general rule to the extent so prescribed. In application for leave to sue as a pauper appeals a recognized agent cannot, therefore, appear. The words "appearance, application or act" in Order III Rule 1 CPC only mean appear, make application and take such other necessary steps as may be required to be taken up for the progress of the proceedings. It offers no guidance whatsoever for giving deposition on oath as a Power of Attorney on behalf of a party. It is not a part of the pleadings. It is the part of the procedure for proving a case by competent witness. It does not deal with evidence to be adduced in a legal proceeding at all. Merely because the aforesaid provision does not deal with the evidence or who may testify, or depose, it cannot be said that the General Power of Attorney has no such power to depose. Order III CPC does not deal with the power of Power of Attorney Holder exhaustively. (D) INDIAN EVIDENCE ACT, 1872 - SECTION 61-Primary and Secondary Evidence-Proof of documents-Suit for declaration of title-Party examing power of Attorney Holder-Power of Attorney Holder having no personal knowledge-Evidencary value of such power of Attorney Holder-HELD-In a suit for declaration of title, the plaintiff has to establish his title. Title cannot be established by his personal knowledge. It has to be established by producing documents under which he is claiming title, most of the time under a registered document. In so far as documents are concerned Section 61 of the Evidence Act mandates that the contents of documents may be proved either by primary or secondary evidence. Primary evidence means the documentary evidence produced for inspection of the Court. Therefore, when a particular fact is to be established by production of documentary evidence there is no scope for leading oral evidence and there is no scope for personal knowledge. What is to be produced is the primary evidence, i.e., document itself. The said evidence can be adduced by the party or by his Power of Attorney Holder. Production of the document, marking of the document is a physical act which does not need any personal knowledge. Even proof of the document is by examining the persons who are well versed with the document or by examining the attesting witnesses or the executant of the document. Again the

personal knowledge of the plaintiff has no role to play. In those circumstances it is open to the plaintiff to examine the Power of Attorney Holder, produce the documents through the Power of Attorney Holder, mark the same and examine witnesses to prove the said document if it is denied. Therefore, the contention that the evidence of a Power of Attorney Holder cannot prove the case of the plaintiff in all cases is not correct and that is not the law laid down by the Supreme Court in Janaki Vashdeo Bhogwani's case reported in (2005) 2 SCC 217. JUDGMENT N. Kumar, J. 1. This is a defendants' second appeal. The subject matter of the suit is, property measuring East to West 11' and North to South 25' bearing No. 518 situated at Adagal Railway Station, Badami Taluk, Bijapur District, now Bagalkot District. 2. The respondent-plaintiff filed a suit for declaration and possession of the suit schedule property. His specific case was one Basanagouda s/o Rudragouda Patil was the owner and in possession of property located in Nandikeshwar Mandal Panchayat No. 518 and 519 of Adagal Railway Station, Badami, which he purchased for a consideration of Rs. 23,000/- under a registered sale deed dated 24.9.1990 and he was in possession of the property on the date of sale deed. In the suit schedule property which is shown by letters A, B, C, D, in the plaint sketch, defendants are residing on leave and licence granted by his vendor. At the time of sale of the schedule property in favour of the plaintiff, defendant No. 1 had executed an agreement letter in favour of his vendor agreeing to vacate the suit property as and when his vendor request him to vacate. They took time to vacate the property. After purchase of the property when the plaintiff requested him to vacate he did not do so. As he had obtained licence for permission to put up construction and a sanctioned plan, he was constrained to file a suit for declaration of his title and for possession. Defendants contested the claim and denied the ownership of the plaintiff over the suit schedule property. They contended that the suit property belonged to one Ramanaik Konappa Naikar who had given it to defendants' grandfather by name Hanamappa and they have put up a dwelling house in the suit schedule property thirty years back. They also constructed a tea stall-cum-restaurant which has been given M.P.C. No. 565 by the Pancliayath for which they have also obtained electricity connection. After the death of Hanamappa his widow and children have become the owners of the said property. They have perfected their title to the said property by adverse possession. The plaintiff is trying to take possession of the property by force. Therefore, the defendants were constrained to file a suit and obtain an order of injunction. Hence, they contended that the plaintiff has no title to the suit property. 3. On the aforesaid pleadings, the Court below framed as many as seven issues. Plaintiff examined himself and two other witnesses and marked Exhibits PI to P8. Defendants on their part examined three witnesses and marked documents Exhibits Dl to D9. The Learned Trial Judge on appreciation of the oral and documentary evidence held that, the plaintiff has established his title to the property; defendants have failed to establish their plea of adverse possession; the agreement executed by the first defendant in favour of his vendor establishes that the defendants are in possession of the suit schedule property as licencees and therefore, he decreed the suit. Aggrieved by the said judgment and decree, the defendants preferred

a Regular Appeal. The first Appellate Court on re-appreciation of the entire evidence on record after formulating the points for consideration by an elaborate reasoning has affirmed the judgment and decree of the Trial Court. Aggrieved by these two judgments and decree, the defendants have preferred this Second Appeal. 4. learned Counsel appearing for the appellants assailing the judgment and decree contends that in the sale deed, the plaint schedule do not tally and the defendants' property is altogether different from the plaintiffs property. The identity of the property was disputed and the Court below has not appreciated this aspect of the defence by the defendants. Secondly he contends that, merely because in Ex.P2 the defendant's signature if found, it does not lead to the inference that the defendants have admitted that they are in permissive possession under plaintiffs vendor. Lastly it was contended that the plaintiff did not step into the witness box and the evidence was given through his Power of Attorney which evidence could not have been taken note of by the Trial Court as held by the Supreme Court in the case of Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Limited and Ors. . In those circumstances, the decree granted by the Courts below is illegal and requires to be interfered with. 5. The material on record clearly establishes that the first defendant's mother filed a suit in O.S. No. 30/92 in the very same Court against the plaintiff and Ors. claiming the relief of declaration and injunction on the ground that she has perfected title over the suit property by adverse possession. Therefore, it is clear that the first defendant nor his mother was the owner of any portion of the suit schedule property. They were claiming title by adverse possession, thereby admitting title of the plaintiff to the suit schedule property. The said suit came to be dismissed on 15.12.1993, which fact is not disputed. It is thereafter the plaintiff filed the present suit for declaration of his title and for possession. To substantiate his claim, plaintiff relies on Ex. P4, the registered sale deed in respect of the suit schedule property which has been proved by examining the executant to the document himself who was admittedly the previous owner of the suit schedule property. First defendant in the course of his evidence admits that the plaintiff has purchased the suit schedule property bearing No. 518. It is his specific case that in the said property in an area measuring 11' x 25' he has put up construction and living with his family members and thus he has perfected his title to the said portion of the property by adverse possession. He has failed to establish the plea of adverse possession by cogent evidence as concurrently held by the two Courts below. The Courts below has carefully considered both the documentary and oral evidence on record and have granted decree of declaration and possession. 6. In the light of the aforesaid undisputed facts, the contention that the identity of the property is not established and there is discrepancy in the boundaries in the sale deed has no substance. The Court below has not merely acted on Ex.P2 to come to the conclusion that defendant was in permissive possession under the plaintiffs vendor. That is a piece of evidence which is taken note of along with other relevant material on record including the admission of the defendant himself and therefore the Courts below committed no illegality in this regard. 7. In so far as the last contention that in view of the law laid down by the Supreme Court in JAN AKIVASHDEO

BHOJWAM'S CASE (SUPRA), referred to supra, the entire evidence adduced on behalf of the plaintiff through the Power of Attorney Holder has to be ignored and if so ignored, there is no evidence on record to establish the case of the plaintiff as the plaintiff has not stepped into the witness box is concerned, it also lacks merit. 8. In the aforesaid judgment of the Supreme Court, the question for consideration was, whether the Power of Attorney Holder who deposed was competent to depose about the facts which the party was directed to prove by the Supreme Court by an earlier order. It is in that context the Supreme Court held as under : 12. In the context of the direction given by this Court, shifting the burden of proving on to the appellants that they have a share in the property, it was obligatory on the appellants to have entered the box and discharged the burden by themselves the question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power-of attorney holder does not have personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal. 13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined." "Underlining by me 9. The aforesaid judgment is rendered in the peculiar facts of that case. The question involved in the said case was whether the appellants had any independent source of income and have contributed towards the purchase of the property from their own independent income. The said facts were within the personal knowledge of the appellants and to prove the said facts it was obligatory on the appellants to have entered box and discharge the burden by themselves. However, they did not step into the box, on the contrary their Power of Attorney deposed. Therefore, it was held that the Power of Attorney Holder does not have personal knowledge of the matter, and therefore he can neither depose on their personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal. In that context, the Supreme Court interpreted the work"Act" under Order III Rule 1 of CPC and held that the word "Act" in the aforesaid provision confines only to in respect of acts done by the Power of Attorney Holder in exercise of the power granted by the instrument which does not include deposing in his place and instead of the principal. Therefore, the Supreme Court has not laid down as a proposition of law, that in all cases the evidence of the Power of Attorney

Holder is to be excluded and the plaintiffs case has to fail for not examining him. All that has been said is when plaintiff has to adduce evidence in respect of matters which are within his personal knowledge, the plaintiff cannot prove those matters by examining a Power of Attorney in his place. 10. The principle underlining the aforesaid judgment of the Supreme Court is nothing but the rule of hearsay evidence. Section 60 of the Evidence Act mandates that oral evidence must be direct and it aims at the rejection of evidence which is not direct, that is what is known as hearsay evidence. It is a fundamental rule of evidence that hearsay is not admissible. Oral evidence must be direct, i.e., if it refers to a fact which could been seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. As opposed to this direct evidence, we have what is known as indirect evidence, i.e., transmitted, second hand or hearsay, something which a witness before the Court ' says that he heard from a third party who is not called as a witness and the statement of that witness is inadmissible to prove the truth of the facts stated. This is the most common form of hearsay. The term hearsay is rather ambigous and misleading and it has therefore been purposely excluded from the Evidence Act. Hearsay may be defined to be that which a witness does not say of his own knowledge, but says another has said or signified to him. Hearsay is therefore properly speaking secondary evidence of any oral statement. Hearsay is not now confined to oral statement. In includes what is done or written as well as what is spoken, i.e., all evidence reported whether orally or in writing. Conduct may also be hearsay like statements. The reason advanced for rejection of hearsay are numerous. The two principal objections however appeared to be lack of an oath and the absence of an opportunity to cross-examine him. 11. The proposition of law about the competence of a person to testify as a witness is governed by Section 118 of the Evidence Act. Giving evidence before a Court of law is an act within the meaning of the said provision. However, everyone is not entitled or competent to give evidence as witness before a Court unless one fulfills the requirements of the qualifications envisaged in Section 118 of the Evidence Act. There is no express bar made in the provisions of CPC to debar the Power of Attorney to be examined as a witness on behalf of the parties to the proceedings. Power of Attorney is a competent witness and is entitled to appear as such. His evidence cannot be refused to be taken into consideration on the ground that the parties to the suit i.e., plaintiff or defendant do not choose to appear as witness in the witness box. The question whether the General Power of Attorney Holder of a party can be competent witness on behalf of a party has to be answered in the light of Section 118 of the Evidence Act. The Power of Attorney Holder of a party, only on the ground that he holds the power of attorney, cannot be said to be in the category of persons who are incapable of being witness as provided by Section 118 of the Evidence Act. Whether such Power of Attorney Holder has

personal knowledge about the matters in controversy, may be a question which can be thrashed out by cross-examining him and if it is found that the Power of Attorney Holder has no personal knowledge about the facts in controversy, the evidentiary value of his deposition may be determined, but that has nothing to do with the competence of such a Power of Attorney Holder to depose before a Court or a Judicial Tribunal as a competent witness. 12. The Power of Attorney Holders are regulated by the Power of Attorney Act, 1882. The statement of objects and reasons of the said Act states "as the law stands, the donee of a power of attorney, when executing an instrument pursuant to the power, must sign, and where sealing is required must seal, in his principal's name." The first object of the bill was to render it legal for such donor to execute in and with their own names and seals. The said Act does not however confer on a person a right to act through agents. It presupposes that the agent has the authority to act on behalf of the principal, and protects acts done by him in exercise of that authority but in his own name. After Independence and coming into force of the Constitution, the Law Commission in its 68th Report examined this Act and while suggesting that, because of its archaic form and language it should be replaced by anew enactment, it also suggested certain amendments to the Act. As the amendments did not call for any radical or substantial changes in the Act that had worked smoothly for a century, it was proposed, instead of replacing the Act by a new one, to make the necessary amendments therein. Among others, the Commission suggested for insertion of a suitable definition of "Power of Attorney", as the Act did not contain one. Therefore, Section 1-A was introduced by Act No. 55/1982 by the Parliament amending the Act. Hence, the Power of Attorney under the Act includes any instrument empowering a specified person to act for and in the name of the person executing it. It is an inclusive definition. 13. The Power of Attorney Holder is nothing, but an agent as defined in Section 182 of the Contract Act. It differs from agency in that, while in the case of agency the principal is only bound by acts of his agent, the holder of a power of attorney not only acts on behalf of the principal so as to bind the latter, but also acts in the name of the principal and uses his name in the instruments executed by him as the attorney. Prior to enactment, an agent having authority to execute an instrument has to sign in the name of the principal if he was to be bound. If the agent signed the deed in his name albeit as agent, he was the person who was regarded as party to the document and not the principal. It was the agent alone that could enforce the deed and he was only liable to pay. It was to overcome this hardship that the Act was enacted. 14. The provisions of Order III Rule 1 CPC deal with the legal position of the validity of attorney in conduct of cases for a limited purpose and in a limited context. The primary object of Order III Rule 1 CPC is to enable a party to perform certain acts before the Court, which he would have been otherwise required to do in person through recognized agent or pleader. The other object is to prevent perpetration of fraud by unauthorized person who poses himself to be the agent of a party before a Court. Order III Rule 2 contemplates the" persons who are authorized to act. No unauthorized person can take part in the proceedings before a Court of law. Order III does not

deal with the rights of parties who appear in person in Court, Order III Rule 1 CPC enacts a general rule and confers only procedural right. There are other modes of appearances, applications, or acting, expressly prescribed by the Code for particular cases, e.g., Order 33 Rule 3 and Order 44 Rule 1 CPC which, by reason of the words "except where otherwise provided by any law for the time being in force" are taken out of the operation of the general rule to the extent so prescribed. In application for leave to sue as a pauper appeals a recognized agent cannot, therefore, appear. The words "appearance, application or act" in Order III Rule 1 CPC only mean appear, make application and take such other necessary steps as may be required to be taken up for the progress of the proceedings. It offers no guidance whatsoever for giving deposition on oath as a Power of Attorney on behalf of a party. It is not a part of the pleadings. It is the part of the procedure for proving a case by competent witness. It does not deal with evidence to be adduced in a legal proceeding at all. Merely because the aforesaid provision does not deal with the evidence or who may testify, or depose, it cannot be said that the General Power of Attorney has no such power to depose. Order III CPC does not deal with the power of Power of Attorney Holder exhaustively. 15. Therefore, the contention that the evidence on record cannot be taken into consideration to declare the title of the plaintiff has no substance. The suit is one for declaration of title and for possession. In a suit for declaration of title, the plaintiff has to establish his title. Title cannot be established by his personal knowledge. It has to be established by producing documents under which he is claiming title, most of the time under a registered document. In so far as documents are concerned Section 61 of the Evidence Act mandates that the contents of documents may be proved either by primary or secondary evidence. Primary evidence means the documentary evidence produced for inspection of the Court. Therefore, when a particular fact is to be established by production of documentary evidence there is no scope for leading oral evidence and there is no scope for personal knowledge. What is to be produced is the primary evidence, i.e., document itself. The said evidence can be adduced by the party or by his Power of Attorney Holder. Production of the document, marking of the document is a physical act which does not need any personal knowledge. Even proof of the document is by examining the persons who are well versed with the document or by examining the attesting witnesses or the executant of the document. Again the personal knowledge of the plaintiff has no role to play. In those circumstances it is open to the plaintiff to examine the Power of Attorney Holder, produce the documents through the Power of Attorney Holder, mark the same and examine witnesses to prove the said document if it is denied. Therefore, the contention that the evidence of a Power of Attorney Holder cannot prove the case of the plaintiff in all cases is not correct and that is not the law laid down by the Supreme Court in the aforesaid judgment. In the instant case, the registered sale deed is produced and the same is proved by examining the executant of the said document, and it is on the basis of the said evidence the suit is decreed, which cannot be found fault with. 16. Under those circumstances, no substantial question of law do arise for consideration in this second appeal as all the questions raised are pure questions

of fact and there is a concurrent finding recorded by the two Courts below based on evidence. Therefore, the appeal is rejected at the stage of admission itself.