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Constructive Res Judicata and the Right to a Fair Hearing: Reconsidering Explanation IV to Section 11 CPC

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Abstract

Constructive res judicata is one of the most powerful finality doctrines in Indian civil procedure. Explanation IV to Section 11 of the Code of Civil Procedure, 1908 deems a matter that "might and ought" to have been raised as a ground of attack or defence in a former suit to have been directly and substantially in issue, even where the matter was not actually argued or adjudicated. The doctrine serves important public interests: it prevents fragmentation of litigation, protects parties from repeated proceedings and preserves the authority of judicial decisions. Yet its artificial character creates a procedural tension. A matter that was never actually heard may nevertheless be treated as if it had been decided, potentially converting procedural omission into substantive finality. This article argues that Explanation IV should remain a strong anti-fragmentation rule but should not be applied mechanically. The decisive inquiry should not be whether a plea was theoretically available, but whether the party had a genuine procedural opportunity, within the scope and structure of the former proceeding, to raise and have the matter adjudicated. The article analyses Section 11, the "might and ought" test, leading Supreme Court jurisprudence and the relationship between constructive res judicata and natural justice. It particularly examines the State of U.P. v Nawab Hussain, Forward Construction Co. v Prabhat Mandal, Hope Plantations Ltd v Taluk Land Board, Kewal Singh v Lajwanti and the Supreme Court's recent decision in Makardhwaj Ram v Jagdish Rai (2026). It proposes a Fair Opportunity Test comprising availability, procedural competence, material nexus, realistic opportunity and proportionality. It concludes that Explanation IV should be understood as a doctrine of procedural finality, not procedural forfeiture: it should bar matters that genuinely belonged to the former litigation and could fairly have been adjudicated there, but should not manufacture an adjudication where the earlier proceeding did not provide a meaningful opportunity to be heard.

Keywords: Constructive Res Judicata; Section 11 CPC; Explanation IV; Fair Hearing; Natural Justice; Civil Procedure

1. Introduction

Finality is indispensable to adjudication. A legal system in which every dispute can be reopened indefinitely would provide neither effective justice to successful litigants nor stability to legal relationships. The doctrine of res judicata embodies this institutional requirement. Section 11 of the

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Code of Civil Procedure, 1908 (CPC) provides that a court shall not try a suit or issue where the matter directly and substantially in issue was directly and substantially in issue in a former suit between the same parties, litigating under the same title, before a competent court, and was heard and finally decided (Code of Civil Procedure 1908, s 11).

Explanation IV considerably extends this principle. It provides that any matter which "might and ought to have been made ground of defence or attack" in the former suit shall be deemed to have been directly and substantially in issue in that suit. Constructive res judicata is consequently different from ordinary res judicata. Ordinary res judicata is concerned with a matter actually adjudicated; constructive res judicata operates through a legal deeming mechanism. It treats an omitted matter as though it formed part of the former litigation because the party was expected to have raised it in the earlier proceeding.

The policy justification is compelling. Litigation should not be conducted in instalments. A party should ordinarily present the grounds that properly belong to a dispute in the proceeding where the dispute is first litigated. In State of U.P. v Nawab Hussain (1977), the Supreme Court described constructive res judicata as an aspect or amplification of the general principle and applied it where a ground that could and ought to have been raised in earlier writ proceedings was later asserted in a civil suit. In Forward Construction Co. v Prabhat Mandal (1986), the Court extended the principle to matters within the legitimate purview of the original action, including claims and defences that should have been litigated together.

The difficulty arises from the phrase "might and ought". "Might" asks whether the matter was capable of being raised. "Ought" introduces a normative judgment: whether, considering the nature and scope of the earlier proceedings, the party should have raised it. If "ought" is reduced to a presumption that every legally available plea should have been raised, constructive res judicata may become excessively rigid. It can transform a procedural omission into a final adjudication without any actual judicial consideration.

This concern becomes acute when the earlier proceeding had procedural limitations. A claim may have been theoretically conceivable but unavailable through the form of the earlier action; evidence may not yet have existed; a later cause of action may not have matured; a party may have lacked the procedural vehicle to obtain the desired relief; or the relationship between the omitted matter and the original controversy may have been too remote. In such circumstances, treating the matter as constructively decided risks undermining the basic idea that adjudication should follow an opportunity to be heard.

The right to a fair hearing is not confined to criminal procedure. Civil adjudication can determine property, contractual rights, livelihood, status and other significant interests. Natural justice therefore provides an important value against which procedural bars may be assessed. Constructive res judicata cannot be allowed to create an artificial adjudication where the party did not have a fair procedural opportunity to have the matter determined.

The argument is not that Explanation IV should be weakened whenever a litigant claims that a matter was omitted inadvertently. Such a rule would undermine finality and reward fragmented litigation. Nor should every procedural disadvantage defeat the doctrine. The better

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approach is to distinguish negligent omission from absence of a genuine opportunity. The former ordinarily attracts constructive res judicata; the latter should not.

This article proposes a Fair Opportunity Test. Before applying Explanation IV, a court should ask: (1) Was the matter legally and factually available during the earlier proceeding? (2) Did the earlier forum possess procedural competence to entertain and adjudicate it? (3) Was there a sufficient nexus between the matter and the controversy actually before the court? (4) Did the party have a realistic opportunity to raise it, including a meaningful opportunity to obtain the necessary relief? and (5) Would barring the later proceeding be proportionate to the interests of finality and fairness?

The analysis takes particular account of Makardhwaj Ram v Jagdish Rai (2026 INSC 636). There, the Supreme Court held that a subsequent title and possession suit was not barred merely because the plaintiff had not asserted a broader title claim in earlier suits challenging particular sale deeds. The Court emphasised the scope and nexus of the earlier litigation and cautioned against an unduly harsh application where there was no occasion to assert the later right. The decision provides a contemporary basis for reconnecting Explanation IV with procedural opportunity rather than mere theoretical availability.

The article proceeds by examining the foundations of res judicata, the statutory structure of Section 11, the development of constructive res judicata, its relationship with fair hearing, procedural constraints and recent Supreme Court doctrine. It concludes with a proposed interpretive framework and recommendations for a more principled application of Explanation IV.

2. The Normative Foundations of Res Judicata

2.1 Finality, public policy and individual justice

Res judicata serves two related interests. The first is institutional: courts require finality so that judicial decisions settle disputes rather than merely pause them. The second is individual: parties should not be repeatedly exposed to the cost, uncertainty and burden of litigation concerning the same dispute. In Satyadhyan Ghosal v Deorajin Debi (1960), the Supreme Court described the principle as resting on the need to give finality to judicial decisions and recognised that it may operate between stages of the same litigation as well as between separate proceedings.

State of U.P. v Nawab Hussain (1977) articulated the dual policy basis particularly clearly. The Court referred to finality and conclusiveness in the general interest of the community and protection of individuals against multiplication of litigation. These rationales remain persuasive. A party who has obtained a final judgment should not be compelled to defend the same dispute indefinitely, and courts should not repeatedly expend judicial resources on matters that properly belong to a single controversy.

Yet finality is not an absolute value. Procedure exists to secure adjudication, not to replace it. The legitimacy of res judicata therefore depends upon the assumption that the earlier proceeding was capable of producing a fair and authoritative determination. This is straightforward where a matter was expressly raised, contested and decided. It is more difficult where the law deems a matter

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decided despite its never having been argued. The legitimacy of constructive res judicata must consequently depend on the quality of the opportunity that existed in the earlier proceeding.

2.2 Actual and constructive res judicata

Actual res judicata concerns a matter directly and substantially in issue that was heard and finally decided. Explanation IV addresses a different situation. The matter was not necessarily raised or adjudicated, but the law treats it as though it formed part of the former litigation because it might and ought to have been raised. This makes constructive res judicata an artificial doctrine by design.

The artificiality is not itself a defect. Legal systems routinely employ deeming provisions to prevent evasion of substantive policies. The difficulty is determining the limits of the fiction. If the objective is to prevent parties from splitting genuinely connected claims and defences, the doctrine should target matters that properly belonged to the original controversy, rather than every matter that could theoretically have been mentioned in the first proceeding.

This distinction is reflected in Forward Construction Co. (1986), where the Supreme Court explained that the doctrine reaches matters incidental to or essentially connected with the subject matter of the earlier litigation and within its legitimate purview. "Legitimate purview" is important. It indicates that constructive res judicata is not merely a test of logical possibility; it is a test of procedural and substantive belonging.

3. Explanation IV and the "Might and Ought" Requirement

3.1 "Might" as availability

The first limb asks whether the omitted matter might have been raised. This ordinarily concerns temporal and procedural availability. A plea based on facts that did not exist at the time of the earlier suit cannot ordinarily be said to have been available. Similarly, a legal ground dependent upon a later event may not have been capable of assertion. The court must identify the relevant date and examine what was actually available to the party then.

Availability should not be assessed at an unrealistically high level of abstraction. Almost any later legal argument can be reconstructed as something that could have been anticipated from existing facts. The question should instead be whether the party could, through reasonable litigation conduct, have placed the matter before the earlier court as a genuine ground of attack or defence. This protects finality without imposing hindsight-based obligations.

Makardhwaj Ram (2026) illustrates this distinction. The Supreme Court examined the scope of earlier suits challenging specific sale deeds and the later suit asserting title and possession over a broader property. It held that the later claim was not barred because the earlier proceedings were directed toward particular transactions and there was no occasion to assert the broader right in the manner later pursued (Makardhwaj Ram 2026).

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3.2 "Ought" as a normative limitation

The second limb—"ought"—is more important for fairness. It requires the court to determine whether the party should have raised the matter in the earlier litigation. This is inherently contextual. The Supreme Court in Forward Construction Co. and later decisions has emphasised the nexus between the omitted matter and the earlier controversy. A matter that was merely convenient to raise is not necessarily a matter that ought to have been raised.

The word "ought" can therefore be understood as a reasonableness and proportionality control. It asks whether a reasonably diligent litigant, considering the scope of the proceeding, would have been expected to present the matter then. The answer should consider the nature of the relief, the procedural vehicle, the evidence available and the relationship between the claims.

This interpretation prevents a conceptual contradiction. Constructive res judicata is justified on the premise that a party should have had its entire case determined in one proceeding. If the earlier proceeding could not realistically determine the omitted matter, there is no strong finality interest in pretending that it did. The "ought" requirement is the point at which the doctrine can accommodate fairness without abandoning finality.

4. The Right to a Fair Hearing in Civil Procedure

4.1 Fair hearing beyond criminal procedure

The principles of natural justice are not confined to criminal trials. Civil proceedings can determine property, contractual rights, livelihood, status and other significant interests. The right to be heard therefore informs the legitimacy of civil adjudication. Although the exact content of a fair hearing varies with context, basic procedural fairness ordinarily requires notice of the case to be met, an opportunity to present one's position and an impartial adjudicative process.

Constructive res judicata does not itself deny a hearing in the second proceeding; instead, it denies access to adjudication on the omitted matter because the law treats the omission as conclusive. This makes the earlier opportunity crucial. The doctrine is legitimate when the party deliberately or negligently failed to present a matter that properly belonged to the first case. It becomes problematic when the party is barred despite never having had a realistic procedural opportunity to obtain a determination.

The fairness issue is therefore temporal. The relevant question is not simply whether the party was heard in the first proceeding, but whether the party was fairly positioned to raise the particular matter that is now sought to be litigated. A person can receive a full hearing on one controversy while having no meaningful opportunity to litigate another, even if the two disputes share facts.

4.2 Natural justice and procedural finality

There is no absolute rule that every legal claim must receive a separate hearing. Procedure routinely imposes limitation periods, pleading rules, joinder requirements, res judicata and other restrictions.

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Fairness therefore operates within a system of orderly adjudication. The relevant principle is that procedural bars should be connected to legitimate objectives and applied in a manner that does not arbitrarily deprive a party of a remedy for a matter that could not fairly have been adjudicated earlier.

This suggests a proportionality-oriented understanding of Explanation IV. Finality and efficiency are legitimate objectives. But the stronger the deprivation caused by the bar, and the weaker the connection between the omitted matter and the earlier proceeding, the stronger the justification required for applying constructive res judicata. The doctrine should be strongest where the later claim is plainly a repackaging of the earlier dispute and weakest where the later claim concerns a distinct right that had not matured or could not realistically have been determined earlier.

5. Leading Supreme Court Jurisprudence

5.1 State of U.P. v Nawab Hussain

In State of U.P. v Nawab Hussain (1977), a police officer challenged his dismissal in writ proceedings on certain grounds. After the writ petition failed, he brought a civil suit relying on another ground that could have been raised in the earlier proceedings. The Supreme Court applied constructive res judicata. The case established that a litigant cannot ordinarily reserve grounds of attack and pursue them successively in different proceedings concerning the same dispute.

The decision remains foundational because it demonstrates the anti-fragmentation purpose of Explanation IV. It also confirms that constructive res judicata can operate beyond conventional civil suits where the same public-law controversy is being re-litigated. But Nawab Hussain should not be read as establishing that every unraised ground is barred automatically. Its reasoning depends on the ground being one that might and ought to have been raised in the earlier proceeding.

5.2 Forward Construction Co. v Prabhat Mandal

Forward Construction Co. v Prabhat Mandal (1986) is significant for explaining the scope of constructive res judicata in representative and writ litigation. The Court treated an adjudication as conclusive not only regarding the actual matter determined but also regarding other matters that parties might and ought to have litigated as incidental to or essentially connected with the subject matter. The doctrine was applied to a writ proceeding.

The judgment is important because of its reference to the legitimate purview of the original action. The question is not whether a later matter can be intellectually connected to the earlier dispute after the fact; it is whether the matter was sufficiently connected that fairness and procedural economy required it to be raised then.

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5.3 Hope Plantations Ltd v Taluk Land Board

Hope Plantations Ltd v Taluk Land Board (1999) restated the public-policy basis of res judicata and distinguished cause-of-action estoppel and issue estoppel. The Court explained that where parties have had an opportunity to controvert a matter, the law may treat it as having been effectively dealt with even if it was not actually argued. The decision also emphasised that Section 11 is not exhaustive of the general doctrine of res judicata.

The reference to opportunity is central to fair-hearing analysis. Constructive res judicata does not depend upon actual argument, but it does require a meaningful opportunity to controvert the matter. That principle provides a doctrinal bridge between finality and fairness. The stronger the evidence that the party had a genuine opportunity to raise the issue, the stronger the case for treating its omission as final.

5.4 Kewal Singh v Lajwanti

In Kewal Singh v Lajwanti (1980), the Supreme Court considered the operation of constructive res judicata in the context of procedural changes to a pleading. The decision illustrates that parties cannot ordinarily withdraw a matter from litigation and later seek to revive it as though it had never been placed before the court. It also demonstrates the need to distinguish constructive res judicata from other procedural doctrines such as Order II Rule 2.

The broader lesson is that the law is concerned with the integrity of litigation as a whole. But different procedural bars should not be conflated. Constructive res judicata concerns matters that should have been litigated in the former proceeding; Order II Rule 2 concerns splitting claims arising from the same cause of action. Courts should identify the correct doctrine and apply its distinct requirements rather than using "finality" as a general substitute for statutory analysis.

5.5 Makardhwaj Ram v Jagdish Rai: a contemporary qualification

The Supreme Court's decision in Makardhwaj Ram v Jagdish Rai (2026 INSC 636) provides an important contemporary qualification. The dispute involved earlier suits challenging sale deeds executed by a power-of-attorney holder and a later suit concerning title and possession over a broader property. The High Court had treated the later claim as barred because the plaintiff should have asserted the broader title claim earlier. The Supreme Court disagreed.

The Court emphasised that the earlier proceedings had a narrower object and that there was no occasion in those proceedings to assert the larger right in the form later pursued. It treated the application of constructive res judicata as unduly harsh where the earlier litigation did not provide the necessary occasion. The Court nevertheless reaffirmed the general principle that parties must ordinarily bring forward grounds properly belonging to the earlier litigation (Makardhwaj Ram 2026).

The significance is therefore methodological rather than doctrinally revolutionary. The judgment does not weaken Explanation IV; it demonstrates how its limiting words should work. The

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court must identify the actual ambit of the former proceedings before deciding whether a later claim was something that the party "ought" to have raised.

6. Situations Requiring Restraint

6.1 Matters arising after the former suit

A matter that did not exist or could not reasonably be raised when the former suit was instituted should ordinarily not be treated as constructively adjudicated. The doctrine is directed at omitted grounds, not future events. A subsequent cause of action based on a later breach, later dispossession, later administrative action or later statutory development may therefore fall outside Explanation IV, depending on the rights involved.

Courts should be particularly cautious where the later claim depends on facts occurring after the earlier judgment. Finality cannot require a litigant to anticipate future wrongs. At the same time, a party cannot manufacture a new cause merely by changing the language of an old grievance. The court must distinguish a genuinely subsequent cause from a repackaged earlier one.

6.2 Lack of procedural competence

A matter may be factually connected to the earlier dispute but procedurally outside the jurisdiction or competence of the earlier forum. The "ought" requirement should take account of this. It would be artificial to say that a party ought to have obtained relief from a forum that could not lawfully grant it.

This also reflects Section 11's structure, which expressly requires competence for ordinary res judicata. Although constructive res judicata modifies the requirement of actual adjudication, it should not make procedural impossibility irrelevant. The legitimacy of the deeming fiction depends on an earlier process capable of resolving the matter.

6.3 Later-maturing rights

A right may be legally recognisable in the abstract but not actionable in the form later asserted. A continuing relationship may generate successive obligations, or a later event may trigger a distinct cause of action. The existence of a factual relationship between parties does not mean that every future claim must be raised in the first suit.

The court should identify the precise cause of action and relief in each proceeding. If the later claim requires a factual or legal condition absent in the former suit, constructive res judicata should not erase that distinction. Finality attaches to the controversy that could fairly have been litigated, not to every legal consequence that might eventually emerge from the same relationship.

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6.4 Procedural constraints

Pleading restrictions, statutory procedures, representative capacity, limitation rules and other conditions may affect whether a party could realistically have raised a matter. The fact that a lawyer could have imagined an argument does not establish that the party had a meaningful procedural route to litigate it. Explanation IV should therefore be applied with attention to the procedural architecture of the earlier case.

This does not excuse tactical pleading omissions. A party cannot deliberately avoid raising an available defence merely to preserve it for later. The distinction is between tactical or negligent omission within a procedurally capable proceeding and genuine inability or lack of occasion. The former is precisely what constructive res judicata addresses; the latter should ordinarily fall outside its proper scope.

7. Constructive Res Judicata and Access to Justice

The doctrine has an access-to-justice dimension operating in both directions. Finality protects defendants and successful litigants from repeated proceedings. But an overly broad bar can impair access to justice by preventing adjudication of claims that were never fairly available earlier. The challenge is therefore not to choose between finality and access, but to define finality in a way that supports legitimate adjudication.

Repeated litigation can itself be abusive. A claimant who raises one ground after another in successive proceedings imposes costs on the opposing party and the judiciary. Explanation IV prevents such fragmentation. However, the opposite danger is procedural overreach: treating every later claim as an omitted ground because the same facts appear in the background. The judicial task is to identify the actual dispute, its boundaries and the legal relief that could reasonably have been sought.

The Fair Opportunity Test proposed below is intended to mediate these concerns. It treats finality as strongest where the later proceeding is essentially a second attempt to litigate the same controversy, and weaker where the later proceeding concerns a distinct or subsequently matured right. Such an approach does not create a broad exception to Section 11; it gives substantive content to the statutory word “ought”.

8. A Proposed Fair Opportunity Test

8.1 Stage One: Availability

The court should first identify whether the matter was factually and legally available when the former proceeding was instituted and, where relevant, when pleadings closed. A later event or later-accruing cause of action should ordinarily not be treated as an omitted ground. The court should avoid hindsight and assess availability based on the information and legal position reasonably accessible at the relevant time.

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8.2 Stage Two: Procedural competence

The second question should be whether the earlier proceeding was procedurally capable of determining the matter. This includes the nature of the forum, jurisdiction, available forms of relief, applicable pleading rules and statutory limitations. If the earlier proceeding could not effectively adjudicate the matter, the "ought" requirement should ordinarily fail.

8.3 Stage Three: Material nexus

The third inquiry concerns the relationship between the omitted matter and the original controversy. The matter should be sufficiently connected to the subject matter that it formed part of the legitimate purview of the earlier action. Mere factual overlap should not be enough. The court should ask whether determining the omitted matter was necessary, incidental or substantially connected to resolving the original dispute.

8.4 Stage Four: Realistic opportunity

The fourth inquiry asks whether the party had a realistic opportunity to raise and litigate the matter. This includes notice, access to necessary facts and evidence, procedural ability to plead the matter and the practical possibility of obtaining an adjudication. The opportunity need not be perfect; litigation always operates under constraints. But it must be genuine enough that treating omission as final is fair.

8.5 Stage Five: Proportionality and prejudice

Finally, the court should consider the consequences of applying the bar. The inquiry remains anchored in Section 11, not a free-standing equitable jurisdiction. Nevertheless, where the earlier proceeding was narrow and the later claim concerns a distinct right, the prejudice of barring adjudication may substantially outweigh the finality interest. Conversely, where the later claim is plainly a repackaging of a matter deliberately withheld earlier, finality should prevail strongly.

The test can be stated as follows: a matter should be constructively barred only where it was available, procedurally cognisable, materially connected to the former controversy, realistically capable of being raised and adjudicated, and sufficiently important to the earlier dispute that a reasonably diligent litigant ought to have presented it then. This preserves the mandatory character of Explanation IV while ensuring that "ought" has genuine limiting force.

9. Relationship with Order II Rule 2 and Abuse of Process

Constructive res judicata is often discussed alongside Order II Rule 2 CPC and the broader doctrine of abuse of process. Although the doctrines overlap in policy, they are not interchangeable. Order II Rule 2 is principally concerned with splitting claims arising from the same cause of action. Constructive res judicata concerns matters that should have been raised in the former proceeding

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and are therefore deemed to have been adjudicated. Abuse of process is broader and may apply where a proceeding is used improperly even if a technical statutory bar is unavailable.

Maintaining these distinctions is important for fairness. A court should not avoid the requirements of Explanation IV by simply describing conduct as abusive, nor should it apply constructive res judicata where statutory conditions are absent. Clear doctrinal boundaries promote predictability and allow litigants to know the consequences of procedural choices.

10. Constructive Res Judicata in Writ Proceedings

Although Section 11 is textually framed around suits, the Supreme Court has repeatedly applied res judicata principles to writ proceedings. Nawab Hussain and Forward Construction are important examples. The policy basis is straightforward: constitutional jurisdiction should not become a mechanism for serially presenting grounds that properly belonged to an earlier challenge.

At the same time, writ proceedings have distinctive features. They may involve public-law remedies, evolving facts, continuing obligations and judicial discretion concerning relief. The application of constructive res judicata must therefore consider the character of the earlier proceeding. A litigant may be barred from raising a ground that was available and central to the original challenge, but a later challenge based on a distinct governmental action or subsequent event may present a different controversy.

The same principle applies to public-interest litigation with additional caution concerning representative capacity and bona fides. The purpose of finality remains important, but the court should examine whether the earlier proceeding genuinely represented the interest later invoked and whether the parties were litigating under sufficiently comparable circumstances.

11. Evidentiary and Procedural Implications

A plea of constructive res judicata should ordinarily be established from the record of the former proceeding. The court should examine pleadings, issues, reliefs sought, orders, judgment and the procedural framework governing the earlier action. The question "might and ought" cannot safely be determined by looking only at the later pleading.

This is especially important because the doctrine depends upon the scope of the former proceeding. The later court should reconstruct what the first court was actually being asked to decide and what the party could reasonably have placed before it. A broad reading based solely on factual similarity risks treating unrelated legal issues as part of the same controversy.

Where the record is ambiguous, courts should be cautious about inferring constructive adjudication. Because Explanation IV creates a legal fiction that may extinguish a substantive claim without actual adjudication, its factual predicates should be clearly established. The party invoking the bar should demonstrate from the former record why the omitted matter properly belonged to the earlier action.

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12. Constitutional and Rule-of-Law Dimensions

The interpretation of procedural finality has constitutional implications. Article 14 requires non-arbitrary adjudication, while Article 21 has been interpreted to inform broader principles of procedural fairness. Civil procedure is ordinarily statutory, but statutory interpretation should remain consistent with basic rule-of-law values.

A structured interpretation of Explanation IV does not conflict with finality. It strengthens the legitimacy of finality by ensuring that the bar is imposed where the earlier proceeding could fairly have resolved the matter. Procedural law gains authority when its restrictions are predictable, principled and connected to the purposes they serve.

The rule-of-law concern is particularly important because constructive res judicata can produce severe substantive effects. A party may permanently lose the ability to litigate a claim without a court ever considering its merits. That outcome can be justified when it results from a fair procedural opportunity and a deliberate or negligent omission. It is harder to justify when the claim was not reasonably capable of being litigated earlier. The doctrine should therefore be understood as enforcing responsibility for procedural choices, not punishing parties for circumstances beyond their procedural control.

13. Recommendations

1. Treat "might and ought" as a two-stage inquiry, with "ought" functioning as an independent safeguard rather than a synonym for "might".
2. Require courts applying Explanation IV to identify the precise matter allegedly barred and the precise aspect of the former proceeding in which it should have been raised.
3. Examine the procedural competence of the earlier forum and whether it could grant the relief later sought.
4. Give substantial weight to the actual pleadings, issues, reliefs and procedural posture of the former proceeding rather than relying on broad factual similarity.
5. Distinguish genuinely subsequent causes of action and subsequently matured rights from repackaged versions of earlier claims.
6. Recognise realistic opportunity, not merely theoretical availability, as central to the meaning of "ought".
7. Distinguish tactical or negligent omission within a capable proceeding from genuine procedural inability or lack of occasion.
8. Apply heightened caution where the later claim concerns a distinct right that was not part of the immediate controversy in the former litigation.
9. Preserve doctrinal distinctions among constructive res judicata, Order II Rule 2 and abuse of process.
10. Require the party invoking constructive res judicata to demonstrate from the former record why the omitted matter belonged to the legitimate purview of the earlier action.

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11. Apply the doctrine consistently to writ proceedings while accounting for continuing wrongs and subsequent governmental action.
12. Treat Makardhwaj Ram (2026) as an important contemporary illustration that Explanation IV should not convert a narrow earlier proceeding into a comprehensive adjudication of every possible right arising from the same factual background.

14. Conclusion

Constructive res judicata performs an indispensable function in Indian civil procedure. Without it, litigants could fragment disputes, reserve grounds for successive proceedings and impose indefinite costs upon opponents and courts. Explanation IV to Section 11 therefore represents a necessary extension of the finality principle. The doctrine is not merely technical; it protects the authority of judgments and the legitimate expectation that litigation will eventually end.

But constructive res judicata is also exceptional because it attributes finality to a matter that may never have been actually argued or decided. That artificial feature makes the procedural opportunity available in the former proceeding critically important. The phrase "might and ought" should not be reduced to "could have mentioned". It requires a contextual judgment about whether the matter belonged to the earlier controversy and whether the party should fairly have been expected to raise it there.

The Supreme Court's jurisprudence provides the foundations for such an approach. Nawab Hussain establishes the anti-fragmentation principle; Forward Construction emphasises legitimate purview and connection; Hope Plantations highlights opportunity; and Makardhwaj Ram provides a contemporary warning against an unduly harsh application where the earlier litigation did not provide occasion to assert the later right. These decisions, read together, support a doctrine that is strong but not mechanical.

The proposed Fair Opportunity Test seeks to make this principle operational. Courts should examine availability, procedural competence, material nexus, realistic opportunity and proportionality. This does not create a judicial exception to Section 11. Instead, it gives meaningful content to the statutory requirement that the matter "ought" to have been raised. A litigant who deliberately or negligently withholds a ground that properly belongs to the first proceeding should ordinarily bear the consequence. A litigant who could not fairly have raised or obtained adjudication of the matter should not be deemed to have lost it merely through a procedural fiction.

Finality and fair hearing are not opposing values. Properly understood, finality is itself a component of justice, but it becomes legitimate only when attached to a proceeding capable of fairly settling the controversy. Explanation IV should therefore be interpreted as a rule of responsible litigation, not as a device for manufacturing adjudication. The aim should be neither endless litigation nor premature closure, but one fair opportunity to litigate the matters that genuinely belong together—and a principled refusal to reopen what that opportunity has already settled.

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